

No. 14462

United States
Court of Appeals
for the Ninth Circuit

WORCESTER FELT PAD CORPORATION, a
Corporation, Appellant,
vs.

TUCSON AIRPORT AUTHORITY, a Corpora-
tion, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

NOV 26 1954

PAUL P. O'BRIEN,

CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	19
Appeal:	
Certificate of Clerk to Transcript of Record	
on	36
Designation of Record on (USCA).....	267
Notice of	32
Order Extending Time to File Record and	
Docket	35
Statement of Points on (USCA).....	266
Stipulation to Extend Time of.....	34
Stipulation Designating Record on (DC)...	33
Certificate of Clerk to Transcript of Record...	36
Complaint	9
Exhibit A—Lease dated March 1, 1949, by	
and between Tucson Airport Authority and	
Worcester Felt Pad Corporation.....	13
Designation of Record on Appeal (USCA)....	267
Docket Entries	3

Minute Entries:

December 8, 1953—Trial	23
December 9, 1953—Trial and Directed Verdict	26
March 24, 1954—Order Denying New Trial..	31
Motion for New Trial	31
Motion to Produce	21
Names and Addresses of Attorneys.....	1
Notice of Appeal	32
Order Denying Motion for New Trial.....	31
Order Extending Time to File Record and Docket Appeal	35
Order for Judgment (M.O. Dec. 9, 1953).....	30
Statement of Points on Appeal (USCA).....	266
Stipulation Designating Record on Appeal (DC)	33
Stipulation to Extend Time of Appeal.....	34
Transcript of Proceedings and Testimony.....	38

Exhibits for Plaintiff:

1—Lease dated March 1, 1949, by and be- tween Tucson Airport Authority and Worcester Felt Pad Corporation.....	13-18
Admitted in Evidence	216
2—Letter dated Oct. 18, 1951, R. W. F. Schmidt to Julius Brauer.....	80
5—Letter dated Sept. 26, 1951, James L. Pattillo to Tucson Airport Authority..	76

Transcript of Proceedings—(Continued)

Exhibits for Plaintiff—(Continued)

- 8—Letter dated Oct. 4, 1951, R. W. F.
Schmidt to Lt. Col. James L. Pattillo.. 87
- 9—Letter dated Oct. 10, 1951, James L.
Pattillo to Tucson Airport Authority.. 94

Exhibits for Defendant:

- D—Certificate of Corporation Commission,
State of Arizona, dated Dec. 8, 1953... 192
- E—Original Signature Card at Bank of
Worcester Felt Pad Corp..... 249-253
- G—Letter dated Oct. 9, 1951, H. Brown for
H. A. Hook to R. F. W. Schmidt..... 257
- H—Letter dated Oct. 6, 1951, R. W. F.
Schmidt to H. A. Hook 259

Witnesses:

Alpert, Robert J.

- direct 177
- cross 178
- recalled, direct 189, 255
- cross 193, 256
- redirect 203, 257

Brauer, Julius

- direct 134
- cross 156
- recalled, cross 204
- redirect 210, 215
- recross 212, 219

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Hansen, J. Leslie

—direct	94
—cross	107
—redirect	110, 120
—recross	111

Klafter, Mark H.

—direct	121
—cross	126
—redirect	131, 133, 134
—recross	132, 133

Pattillo, James L.

—direct	53
—recalled, direct	179, 187

Sayre, Ernest A.

—direct	246
—cross	249

Schmidt, Robert

—direct	67
—cross	91
—redirect	93
—recalled, direct	220
—cross	230
—redirect	237, 242
—recross	240

Stofft, Fred

—direct	243
---------------	-----

Verdict	30
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NAMES AND ADDRESSES OF ATTORNEYS

ARTHUR CUTLER and
C. WAYNE CLAMPITT,

186 North Meyer Street,
Tucson, Arizona,

Attorneys for Appellant.

BOYLE, BILBY, THOMPSON & SHOENHAIR,
B. G. THOMPSON,
RICHARD B. EVANS,

Valley National Building,
Tucson, Arizona,

Attorneys for Appellee.

In the District Court of the United States for the
District of Arizona

Civil Docket No. 657—Tuc.

WORCESTER FELT PAD CORPORATION, a
Massachusetts Corporation, Plaintiff,

vs.

TUCSON AIRPORT AUTHORITY, an Arizona
Corporation, Defendant.

FILINGS—PROCEEDINGS

1952

Apr. 5—File Complaint.

Apr. 5—Issue summons.

Apr. 5—File summons ret'd showing service on
deft's. statutory agent, B. G. Thompson,
on 4/9/52.

Apr. 28—File defendant's answer.

May 6—File Plaintiff's Demand for Jury Trial.

July 7—File Deposition of Robert W. F. Schmidt.

Aug. 25—On for trial setting. Clampitt pres. for
pltf.; Evans pres. for deft. Clampitt
moves for pre-trial conference. Ent. order
setting for trial Jan. 6, 1953, at ten a.m.
subject to pre-trial conference herein.

Dec. 15—File Notice of Taking Deposition.

Dec. 15—File Motion to Produce.

Dec. 15—File Notice of Motion for 12/22/52 at 2:00
p.m.

1952

Dec. 22—On stipulation of counsel, Order trial setting for Jan. 6, 1953 be vacated and Order this case reset for trial Tues. March 31, 1953 at 10 a.m.; further Order deft's Motion to produce be stricken from calendar with provision that said motion may be called up by either party at any time in the future upon three days written notice to the other party.

1953

Mar. 19—File Stipulation and form of order to vacate trial setting and reset on 9/22/53.

Mar. 20—Ent and file Order setting case for trial on Sept. 22, 1953 with a jury, pursuant to stip. therefor.

July 1—Order trial setting on Sept. 22, 1953 be vacated; further Order case set for trial on Nov. 17, 1953 at 10 a.m. with a jury.

Nov. 2—On stip. of counsel, order vacate trial setting Nov. 17, 1953, and order re-set for trial with a jury Dec. 8, 1953, at 10 a.m. Fur. order set for pre-trial conference Nov. 30, 1953, at 2 p.m.

Nov. 30—On for pre-trial conference. Clampitt pres. for pltf.; Evans present for deft. Pre-trial conference had. Order mo. to produce cont. for hearing to 12/4/53, at 9:00 a.m.

Dec. 7—File praecipe for subpoena for James L. Pattillo.

Dec. 7—Issue subpoena for James L. Pattillo.

1953

Dec. 8—File subpoena to Col. Pattillo ret'd exec. 12/7/53 at Grand Central Aircraft, Tucson, Ariz.

Dec. 8—File deposition of Julius E. Brauer.

Dec. 8—On for trial. C. Wayne Clampitt and Arthur Cutler pres. for pltf.; B. G. Thompson and Richard Evans pres. for deft. Both sides announce ready. Exam. of jurors on voir dire. Jury 12 persons empaneled and sworn. Order exc. remaining jurors until further order. Ent. proceedings of trial. Mo. Royston Ass't U. S. Atty, Order record show presence of said Asst. U. S. Atty. as counsel for witness Lt. Col. James L. Pattillo. Order jury excused to 12/9/53 at 10 a.m. and counsel excused to 12/9/53 at 9:30 a.m.

Dec. 8—File Jury List.

Dec. 9—On for fur. trial. Clampitt and Cutler pres. for pltf.; Thompson and Evans for deft. All jurors present. Evans files motion to amend answer, copy served on opposing counsel. Counsel, Cutler, represents that total damages claimed by plaintiff herein amounts to \$135,280.00. Ent. fur. proceedings of trial. In absence of jury counsel for deft. argues motion to amend answer; counsel for pltf. argues same. Order grant motion to amend and order

1953

Dec. 9 amend answer. Plaintiff rests. In absence (Contd.) of jury, Evans moves the Court to instruct the jury to return a verdict in favor of deft. upon grounds pltf. has failed to prove material allegations contained in complaint. Ruling reserved until all evidence in. Ent. fur. proceedings of trial. Deft. rests. Both sides rest. In absence of jury, Evans moves for an order from Court instructing the jury to return a verdict in favor of deft. for reason pltf. has failed to prove allegations of complaint and on additional ground that evidence shows that plaintiff company is a company organized in the State of Massachusetts and never authorized to do business in State of Arizona. Mo. argued by resp. counsel. Court states that will grant mo. for directed verdict. At 4:37 p.m., jury return into open Court and is presented form of verdict. Verdict signed, read and recorded. Jury discharged and excused to fur. order. Mo. Counsel for deft., order judgment in accordance with verdict entered and that plaintiff take nothing by its complaint.

Dec. 9—File Motion to Amend Answer.

Dec. 9—Enter and file verdict for the defendant, Tucson Airport Authority, and against the plaintiff, Worcester Felt Pad Corporation.

1953

Dec. 9—Enter judgment on the verdict for the defendant Tucson Airport Authority, and against the plaintiff, Worcester Felt Pad Corporation and that plaintiff take nothing by its complaint herein.

Dec. 9—File Deft's Praecipe for Subpoena.

Dec. 9—File Subpoena to Ernest A. Sayre.

Dec. 19—File Plaintiff's Motion for a New Trial

Dec. 24—File Deft's Mo. to Strike Mo. for New Trial.

1954

Jan. 4—C. Wayne Clampitt, Esq. pres. for pltf.; Richard Evans, Esq., pres. for deft.; Pltf's Mo. for New Trial and deft's Mo. to Strike Motion for new trial for hearing; Order deny deft's Motion to Strike Motion for New Trial and Order cont. hearing on pltf's Mo. for a New Trial to Jan. 18, 1954 at 2 p.m. Court directs pltf. file with Court and serve upon counsel for deft. within one week memorandum of authorities on which pltf. intends to rely.

Jan. 11—Order cont. pltf's motion for new trial for hearing to Mon. Jan. 25, 1954 at 2 p.m.

Jan. 11—Mail notice to counsel.

Jan. 11—File Pltf's Memorandum of Points and Authorities on Motion for New Trial.

Jan. 22—File deft's Memorandum in Opposition to Pltf's Motion for a New Trial.

1954

Jan. 25—Pltf's Mo. for new trial for hearing.
Clampitt pres. for pltf. Richard Evans
pres. for deft. On stip. of counsel Motion
submitted on memoranda and taken under
advisement by Court.

Mar. 24—Order pltf's Motion for New Trial be
denied.

Mar. 24—Mail notice to counsel.

Apr. 22—File Notice of Appeal.

Apr. 22—File Personal Bond on Appeal secured by
\$250.00 cash.

Apr. 30—File Stipulation for Substitution of Ap-
peal Bond.

Apr. 30—Enter and file Order substituting surety
bond for cash bond.

Apr. 30—File Bond for Costs on Appeal in sum of
\$250.00 with U. S. Fidelity & Guaranty
Co.

May 27—File Stipulation of Counsel to Extend
Time to Docket Appeal.

May 28—Ent. and file Order extending time to File
Record and docket appeal to Aug. 2, 1954
(doc. 6/1/54 at Tuc.)

July 19—File Stipulation Designating Record on
Appeal.

July 23—File Reporter's Transcript of Proceed-
ings (Unsigned)

July 27—File Reporter's Transcript of Proceed-
ings.

1954

July 29—Fwd. Record on Appeal to Clerk of Court of Appeals, San Francisco, California.

July 29—Mail copies of letter of transmittal of record to Court of Appeals and Clerk's Certificate on Record on Appeal to counsel.

[Title of District Court and Cause.]

COMPLAINT

Comes now the above named Plaintiff by its attorney, C. Wayne Clampitt and alleges:

I.

The Plaintiff is a corporation organized under the laws of and a citizen of the State of Massachusetts and sues the Defendant, a corporation organized under the laws of and a citizen of the State of Arizona.

II.

This is a suit on a written contract and the amount in controversy exceeds the sum of Two Hundred Thousand Dollars (\$200,000.00) exclusive of costs.

III.

That on, to-wit: the 1st day of March, 1949, the Plaintiff and Defendant entered into a written lease, copy of which is attached hereto and marked "Exhibit A" and prayed to be read as a part hereof, under which the Defendant leased to the Plaintiff a portion of an airplane hangar situate on the

Tucson Municipal Airport near the City of Tucson and in Pima County, Arizona at a rental of One Hundred Dollars (\$100.00) a month for a term of three years and granting the Plaintiff three options to extend the original term so that at Plaintiff's sole option the lease term could be twelve years in all, and the Defendant reserved unto it only the right to increase the original monthly rental to a maximum of \$125.00 a month during the last six years of said twelve year maximum term.

IV.

That under provision (4) of said lease either Plaintiff or Defendant might terminate this lease in the event that either party was deprived of its use of the leased premises by governmental action in the event of a national emergency and the Plaintiff was required to remove all its property within thirty days of termination or forfeit the same to the Defendant at its option.

V.

That upon the 18th day of October, 1951, the Defendant mailed the Plaintiff by registered mail a written notice as provided in said lease that the Federal Government required Plaintiff's leased premises, under the needs of a national emergency, and that the Defendant was therefore terminating Plaintiff's lease on October 31, 1951 and required Plaintiff to vacate its leased premises in their entirety within 30 days thereafter.

VI.

That the Federal Government neither at the time of said notice, nor at any time before or since, ever required Plaintiff's leased premises, as the Defendant then and there well knew, but instead, the Grand Central Aircraft Company, a civilian private corporation did wish to lease Plaintiff's leased premises from the Defendant, and was ready, willing and able to pay a greatly increased monthly rental for the same, as the Defendant then and there well knew.

VII.

That the Plaintiff, relying upon said notice, and having no knowledge of the matters alleged in Paragraph VI above, surrendered its lease and vacated its leased premises within the required time, all at great cost and expense and suffered and will continue to suffer large monetary losses by reason of the same.

VIII.

That on or about the time Plaintiff vacated said premises, as Plaintiff is informed and believes and therefore alleges, the Defendant leased unto the said Grand Central Aircraft Company the same premises at a monthly rental of approximately \$1,400.00, the exact term, and true description of the premises leased being not known to Plaintiff, but ever since that time, up to and including the date this action is filed, said company has been occupying said premises and paying, as Plaintiff is informed and believes and therefore alleges, said monthly rental. That the difference between the maximum rental

that Plaintiff could have been required to pay for said premises for the remaining 9 years and 7 months of Plaintiff's lease and the rental per month the Defendant is now receiving is One Hundred Forty-Seven Thousand, Seven Hundred Dollars (\$147,700.00).

IX.

That by reason of the loss of Plaintiff's Western plant, Plaintiff has been and is forced to grant a 5% freight allowance upon all orders in the Western part of the United States resulting in an annual loss to it of approximately \$5,000.00, or a total loss for the remaining term of Plaintiff's lease of Forty-Seven Thousand Nine Hundred Sixteen and 62/100 Dollars (\$47,916.62).

X.

That by reason of the Defendant's wrongful termination of said lease, Plaintiff sustained financial losses directly resulting from the closing of its place of business of Eleven Thousand One Hundred and Eighty Dollars (\$11,180.00).

Wherefore Plaintiff brings this suit and claims judgment against the Defendant in the amount of Two Hundred Six Thousand, Seven Hundred Ninety Six and 62/100, (\$206,796.62), Dollars, together with its costs of suit.

/s/ C. WAYNE CLAMPITT,
Attorney for the Plaintiff

EXHIBIT A

LEASE AGREEMENT

This agreement, made and entered into this 1st day of March A.D., 1949, by and between Tucson Airport Authority, an Arizona Corporation, hereinafter called the lessor, and Worcester Felt Pad Corporation, a Massachusetts corporation, hereinafter called the Lessee;

Witnesseth:

Whereas the Lessor has in its custody a building identified as hangar No. Two (No. 2) situate on the west side of Tucson Municipal Airport between hangars No. One (No. 1) and No. Three (No. 3), and

Whereas the Lessee desires to conduct a business of light manufacturing and also the assembling, packaging, selling and distributing of plastic games and novelties, all as a wholesale enterprise, said business not to be in substantial competition with any retail business located on the Tucson Municipal Airport.

Now therefore, Lessor does by these presents lease to Lessee that portion of the second floor of the west "leanto" of said Hangar No. 2, including one stairway, two toilets and one freight elevator, situate between columns one (1) and twenty (20) containing Twelve Thousand Nine Hundred Twenty (12,920) square feet, more or less; together with the right of ingress and egress from the exterior of the hangar to said stairway and elevator, said right to be sufficient for the unloading of one transport type truck at any one time.

Exhibit A—(Continued)

To have and to hold the same to the said Lessee from the first day of June, 1949, to the first day of June, 1952; and said Lessee in consideration of such leasing covenants and agrees to pay Lessor as rent for the same the sum of One Hundred Dollars (\$100.00) per month in advance, payable upon the first day of June, 1949 and the first day of each month thereafter during the term hereof. It is expressly agreed Lessee shall have the right to enter, use, and occupy said premises from the date of this agreement to the first day of June, 1949, without paying any rent except that the Lessee agrees to pay for all utility services used during said period. The said Lessee shall have the option to extend this lease for a further period of three years upon the same terms, covenants and conditions hereinbefore and hereinafter set out, and the Lessee shall have a further option to extend this lease for a further period of three years in the event it exercises the first option, upon the same terms, covenants and conditions hereinbefore and hereinafter set out except that the Lessor may increase the monthly rental a maximum amount of twenty-five per cent (25%) above that prescribed in this lease. Lessee shall have the option to extend for a further period of three years, the term of this lease, provided Lessee has exercised its prior options, upon the same terms, covenants and conditions hereinbefore and hereinafter set out except the Lessor may fix the monthly rental a maximum amount of twenty five per cent (25%) above the original monthly

Exhibit A—(Continued)

rental prescribed in this lease. All options shall be exercised by the Lessee by notice in writing served upon the Lessor by the Lessee not later than thirty (30) days prior to the beginning of the particular three year period sought to be extended.

(1) The Lessee agrees to assume all costs of remodeling, rewiring and reconditioning the demised premises as incidental to initial occupancy, and to bear all costs of electric energy, gas, air conditioning and water consumed by him during all occupancy. (The Lessee agrees that all construction work done upon the demised premises shall be in compliance with the building code of the City of Tucson and the construction code of the Fire Insurance Underwriters.)

(2) The Lessee agrees to save the Lessor harmless from all claims for damage, injury, and distress, and to carry insurance in amounts sufficient to protect the interests of both.

(3) The Lessee shall have the right, in common with others authorized to do so, to use common areas of the airport, including parking areas, roadways and public conveniences in general.

(4) The Lessee recognizes the right of the federal, state and local governments to restrict or limit the use of the airport by the City of Tucson and/or Tucson Airport Authority in the event of national emergency, and in the event of such action depriving either the Lessee or the Lessor of normal enjoyment, agrees to a suspension or termination of the lease at the option of either the Lessor or the

Exhibit A—(Continued)

Lessee. In the event of termination, the Lessee shall have the right to remove all of his property within thirty days after termination, but all items remaining after thirty days may, at the Lessor's option, become its sole property.

(5) The Lessor reserves the right and privilege of moving all of the Lessee's operations as conducted within the premises, including right of ingress and egress, the stairway, the toilets, and/or the freight elevator, to a comparable floor space and location if such action is necessary to facilitate the leasing of an area larger than that let to the lessee. The Lessor agrees that such action will not be undertaken without thirty (30) days notice in writing and that all costs of such a move, including proven losses in revenue resulting directly from said move, shall be borne by the Lessor. The Lessor agrees that no such action shall result in a severance or isolation of any portion of the Lessee's or Sub-Lessee's operations unless agreed to in writing by the Lessee.

(6) It is hereby agreed that no coin-operated vending machine or coin-operated device for amusement purposes may be placed upon the demised premises by the Lessee without the written consent of the Lessor, and the Lessor reserves the right to license such machines to third parties in any portion of the demised premises customarily frequented by the public in contra-distinction to areas commonly frequented by the Lessee, its employees, servants and agents.

Exhibit A—(Continued)

(7) The Lessor shall be responsible only for normal exterior maintenance of the demised premises, and the Lessee shall be responsible for regular interior maintenance including cleaning of area designated for ingress and egress, the stairway, toilets, freight elevator, disposal of waste and rubbish, and compliance with all rules established by the Lessor for mutual well-being and safety. The Lessee agrees that the demised premises shall be available for fire prevention and safe practice inspection by the Lessor or its agents during all business hours.

(8) It is understood and agreed that the Lessee plans on assigning a portion or all of this lease to one or more other corporations and Lessor agrees to approve any such assignment or sub-letting provided that the said assignee or sub-tenant is reasonably satisfactory to the Lessor, but no such assignment shall operate to relieve the Lessee herein from its obligations and duties under the terms of this lease.

(9) All notices, demands and other instruments in writing which the parties may be required to serve or may desire to serve upon each other shall be served as follows, to-wit:

Service upon Lessee shall be by mailing a copy thereof by registered mail, postage prepaid, to the Lessee at its place of business at Tucson Municipal Airport and by mailing a copy thereof by registered mail, postage prepaid, to the Lessee at its place of business at No. 11 Brackett Court, Worcester, Massachusetts.

Exhibit A—(Continued)

Service upon Lessor shall be by mailing a copy thereof by registered mail, postage prepaid, to the Manager of Tucson Airport Authority at the Tucson Municipal Airport, Tucson, Arizona, and a copy thereof to C. Wayne Clampitt, Statutory Agent of said corporation, at 37 North Church Street, Tucson, Arizona.

Lessor and Lessee may from time to time designate another address for service of said notices in correction or to substitute for those hereinabove set out.

In witness whereof the Lessor has caused this instrument to be executed by its duly authorized Manager and the Lessee has caused this instrument to be executed by its duly authorized President, all on the day and year first above written.

TUCSON AIRPORT AUTHORITY,
Lessor

By ROBERT F. SCHMIDT,
Manager

WORCESTER FELT PAD
CORPORATION, Lessee

By JULIUS E. BRAUER,
President.

Permission is hereby given to the lessee to assign a portion of the above described premises to Tech-Toys, Inc.

TUCSON AIRPORT AUTHORITY,
Lessor

/s/ By ROBERT F. SCHMIDT,
Manager.

[Endorsed]: Filed April 5, 1952.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and for its answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

1. Admits the allegations of paragraph I of said complaint.

2. Admits that this is an action brought upon a written contract.

3. Admits the allegations contained in paragraph III of the complaint.

4. In answer to paragraph IV of said complaint, defendant alleges that paragraph (4) of the lease referred to in said complaint is as set forth in the copy of the lease which is appended to, marked Exhibit A, and made a part of plaintiff's complaint.

5. Admits the allegations contained in paragraph V of plaintiff's complaint.

6. Defendant denies the allegations of paragraph VI of the complaint, and in answer thereto alleges that defendant terminated the lease mentioned in plaintiff's complaint under and pursuant to the authority and right retained by defendant to so terminate said lease by virtue of the provisions of paragraph (4) of said lease.

7. In answer to paragraph VII defendant admits that plaintiff surrendered the leased premises and vacated the same prior to December 31, 1951. Defendant has insufficient knowledge on which to either admit or deny the remaining allegations of

said paragraph and calls for strict proof of the same.

8. In answer to the allegations contained in paragraph VIII defendant admits that Grand Central Aircraft Company has been occupying the space heretofore occupied by the plaintiff since February, 1952, upon a month to month occupancy, and that it has paid to defendant, monthly, during the period of its occupancy, the sum of \$299.20, on account of the use and occupancy of said premises by Grand Central Aircraft Company. Defendant further alleges that the total rental value of the premises heretofore leased by plaintiff, for the period of nine years, seven months, from the date that plaintiff vacated said premises, will not exceed \$200 per month.

9. In answer to the allegations contained in paragraph IX of said complaint defendant is without knowledge or information sufficient to either admit or deny the allegations contained in said paragraph, and therefore calls for strict proof of the same.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of said complaint and therefore calls for strict proof of the same.

11. Defendant denies, generally and specifically, each and every allegation contained in said complaint not hereinbefore admitted.

Wherefore, defendant prays that plaintiff take

nothing by its said complaint, that the same be dismissed, and for its costs.

KNAPP, BOYLE, BILBY &
THOMPSON,
/s/ B. G. THOMPSON,
Attorneys for Defendant

[Endorsed]: Filed April 28, 1952.

[Title of District Court and Cause.]

MOTION TO PRODUCE

Comes Now the defendant, Tucson Airport Authority, an Arizona corporation, in the above entitled action, by its attorneys, Knapp, Boyle, Bilby & Thompson, and moves the court for an order directing the plaintiff to produce and permit the inspection and copying or photographing by or on behalf of the defendant of the books and records of the plaintiff corporation for the period from March 1, 1949, through November 30, 1952, showing the business done by the plaintiff from its Tucson Plant prior to its closing said Tucson Plant, and showing the orders filled by it in the western part of the United States subsequent to its closing the Tucson Plant and through November 30, 1952, and showing all financial losses or expenses incurred from the closing of its place of business in Tucson, Arizona.

This motion is made pursuant to Rule 34 of the Federal Rules of Civil Procedure and is based upon

the pleadings on file in the above entitled action and the affidavit of Richard B. Evans, attached hereto and made a part hereof.

Dated this 13th day of December, 1952.

KNAPP, BOYLE, BILBY &
THOMPSON,
/s/ RICHARD B. EVANS,
Attorneys for Defendant

AFFIDAVIT

State of Arizona,
County of Pima—ss.

Richard B. Evans, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, Tucson Airport Authority, an Arizona corporation, defendant in the above entitled action; that he makes this affidavit on its behalf and in support of its motion to produce.

That the records of the plaintiff corporation are material to the above entitled action for the reason that the plaintiff is claiming damages from the defendant upon the grounds that its expenses of operation have been increased as a result of the alleged breach of lease by the defendant, and upon the grounds that they have suffered financial expense resulting from the closing of its place of business in Tucson, Arizona as a result of the alleged breach of lease by the defendant corporation.

That the defendant has no manner available to it for obtaining the information sought by this mo-

tion, other than by inspection of the pertinent books and records of the plaintiff.

/s/ RICHARD B. EVANS,

Subscribed and sworn to before me this 13th day of December, 1952.

[Seal] /s/ WINIFRED TRUSKY,
Notary Public

[Endorsed]: Filed December 15, 1952.

[Title of District Court and Cause.]

MINUTE ENTRY OF TUESDAY, DEC. 8, 1953

Honorable James A. Walsh, United States District Judge, presiding.

This case comes on regularly for trial this day. C. Wayne Clampitt, Esq., and Arthur Cutler, Esq., are present for the plaintiff. B. G. Thompson, Esq., and Richard Evans, Esq., appear on behalf of the defendant. Fred Baker is present as the official court reporter.

Both sides announce ready for trial.

Examination of jurors on voir dire is now had.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case, and

It Is Ordered that all jurors not empaneled in the trial of this case be excused until further order.

Counsel for the plaintiff now states the plaintiff's case to the jury. Thereafter, counsel for the defend-

ant makes statement to the jury on behalf of the defendant.

Plaintiff's Case:

Lt. Colonel James L. Pattillo is now called as a witness for the plaintiff.

On motion of Robert Royston, Esquire, Assistant U. S. Attorney,

It Is Ordered that the record show the presence of said Assistant U. S. Attorney as counsel for the witness Lt. Col. James L. Pattillo.

Lt. Col. James L. Pattillo is now sworn and examined on behalf of the plaintiff.

And thereupon, at 11:55 o'clock a.m., It Is Ordered that the further trial of this case be continued until 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, is excused.

The Jury having withdrawn from the Courtroom, counsel for all parties being present, counsel for the plaintiff now argues the admissibility of testimony.

Thereupon, It Is Ordered that this court stand at recess until 1:30 o'clock p.m., this date.

Subsequently, at 1:30 o'clock p.m., the Jury, and all members thereof, and all counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Lt. Colonel James L. Pattillo, heretofore sworn, is now recalled and further examined on behalf of the plaintiff.

Robert W. F. Schmidt is now sworn and examined on behalf of the plaintiff.

At 1:40 o'clock p.m., the Jury, being first duly admonished, is excused from the Court room. In the absence of the Jury, all counsel being present, counsel for the plaintiff offers proof of his intended procedure.

At 1:55 o'clock p.m., the Jury return into the Courtroom and further proceedings of trial are had as follows:

Robert W. F. Schmidt, heretofore sworn, is now recalled and further examined on behalf of the plaintiff.

The following plaintiff's exhibits are now admitted in evidence:

No. 5, photostatic copy of letter dated September 26, 1951, to the Tucson Airport Authority from James L. Pattillo, Lt. Colonel, USAF.

No. 2, letter dated October 18, 1951, to Julius Brauer from R. W. F. Schmidt.

Plaintiff's exhibits No. 5 and No. 2 are now read to the Jury.

The following plaintiff's exhibits are now admitted in evidence:

No. 8, copy of letter dated October 4, 1951, to Lt. Colonel James L. Pattillo, Lt. Colonel, USAF, from R. W. F. Schmidt.

No. 9, copy of letter dated October 10, 1951, to Tucson Airport Authority from James L. Pattillo, Lt. Colonel, USAF.

The following witnesses are now sworn and ex-

amined on behalf of the plaintiff: J. Leslie Hansen, Mark H. Klafter, Julius Brauer.

Thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued until Wednesday, December 9, 1953, at 10:00 o'clock a.m., to which time the Jury, being first duly admonished by the Court, and parties are excused. It Is Ordered that counsel be excused to 9:30 o'clock a.m., Wednesday, December 9, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
DECEMBER 9, 1953

Honorable James A. Walsh, United States District Judge, presiding.

The Jury, and all members thereof, and counsel for respective parties are present pursuant to recess, and further proceedings of trial are had as follows:

Counsel for the defendant now files motion to amend defendant's answer, a copy of which is served on counsel for the plaintiff. Counsel for the plaintiff represents that the plaintiff is now asking solely the difference between the real value and lease price during the period of the lease yet to run and requests defendant's concession on figures presented in support thereof. Further proceedings of trial are now had as follows:

Plaintiff's Case Continued:

Julius Brauer, heretofore sworn, is now recalled and further examined on behalf of the plaintiff.

Robert J. Alpert is now sworn and examined on behalf of the plaintiff.

Lt. Colonel James L. Pattillo, heretofore sworn, is now recalled and further examined on behalf of the plaintiff.

At 11:00 o'clock a.m., the jury, being first duly admonished, is excused from the Courtroom. In the absence of the Jury, all counsel being present, counsel for the plaintiff makes an offer of proof through the testimony of Lt. Colonel Pattillo, and

It Is Ordered that said offer of proof be and it is rejected.

Hearing is now had on defendant's Motion to Amend Answer. Said motion is duly argued by respective counsel, and

It Is Ordered that defendant's Motion to Amend Answer be and it is granted.

At 11:20 o'clock a.m., the Jury return into the Courtroom and further proceedings of trial are had as follows:

The following witnesses, heretofore sworn, are now recalled and further examined: Lt. Colonel James L. Pattillo, Robert J. Alpert.

Whereupon, the plaintiff rests.

Thereupon, at 11:30 o'clock a.m., It Is Ordered that the further trial of this case be continued until 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, is excused.

The Jury having withdrawn from the Courtroom,

counsel for respective parties being present, counsel for the defendant now moves for a directed verdict in favor of the defendant upon the grounds that the plaintiff has failed to prove material allegations contained in the complaint; that the plaintiff has failed to prove allegations of actionable fraud; that plaintiff has failed to prove allegations of wrongful eviction.

Said motion is now duly argued by respective counsel.

The Court reserves ruling on said motion until all the evidence has been presented.

Thereupon, counsel are excused until 1:30 o'clock p.m., this date.

Subsequently, at 1:30 o'clock p.m., the Jury, and all members thereof, and all counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case:

Defendant's Exhibit D, Certificate of Arizona Corporation Commission, is now admitted in evidence.

The following witnesses, heretofore sworn, are now called and examined on behalf of the defendant: Robert J. Alpert, Julius Brauer.

Plaintiff's Exhibit No. 1, Lease Agreement, is now admitted in evidence.

Robert W. F. Schmidt, heretofore sworn, is now called and examined on behalf of the defendant.

The following witnesses are now sworn and examined on behalf of the defendant: Fred Stofft, Ernest A. Sayre.

The following defendant's exhibits are now admitted in evidence:

E, Signature card of Worcester Felt Pad Corporation. F, Twelve Valley National Bank ledger sheets.

Robert J. Alpert, heretofore sworn, is now recalled and further examined on behalf of the defendant.

The following defendant's exhibits are now admitted in evidence:

G, Photostatic copy of letter dated October 9, 1951 to Mr. R. F. W. Schmidt from H. A. Hook.

H, Copy of letter dated October 6, 1951 to Mr. H. A. Hook from R. W. F. Schmidt.

And the defendant rests.

Both sides rest.

At 4:00 o'clock p.m., the Jury, being first duly admonished, is excused from the Courtroom. In the absence of the Jury, all counsel being present, counsel for the defendant now moves for a directed verdict in favor of the defendant for the reason that plaintiff has failed to prove allegations of the complaint and on additional ground that evidence shows that plaintiff company is a company organized in the State of Massachusetts and never authorized to do business in the State of Arizona.

Said motion is duly argued by respective counsel, and

It Is Ordered that defendant's Motion for a directed verdict be and it is granted.

Thereupon, at 4:37 o'clock p.m., the Jury return into the Courtroom and are instructed to return a verdict in favor of the defendant. Whereupon, the

Foreman signs and presents the following verdict:

Verdict

[Title of Cause.]

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant, Tucson Airport Authority, and against the plaintiff, Worcester Felt Pad Corporation.

December 9, 1953.

John J. Kacergis, Jr., Foreman

The verdict is read as recorded and no poll being desired by either side, the Jury is discharged from the further consideration of this case and excused until further order.

On motion of counsel for the defendant,

It Is Ordered that judgment be entered in accordance with the verdict in favor of the defendant and that plaintiff take nothing by his Complaint herein.

[Title of District Court and Cause.]

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant, Tucson Airport Authority, and against the plaintiff, Worcester Felt Pad Corporation.

December 9, 1953.

/s/ JOHN J. KACERGIS, JR.,
Foreman

[Endorsed]: Filed December 9, 1953.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the plaintiff, Worcester Felt Pad Corporation, in the above entitled action, by its attorney C. Wayne Clampitt, and moves the court for an order setting aside the verdict and the judgment and granting a new trial upon the following ground:

1. The court erred in directing the jury to return a verdict in favor of the defendant.

Plaintiff requests that the court set a day and time for the hearing of the above motion.

/s/ C. WAYNE CLAMPITT,
Attorney for Plaintiff

[Endorsed]: Filed December 19, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY
MARCH 24, 1954

Honorable James A. Walsh, United States District Judge, presiding.

Since the making of the lease sued on herein contemplated and was promptly followed by plaintiff's full scale entry upon the conduct of a manufacturing, sales and distribution business in Arizona, without plaintiff's ever having qualified to do business in Arizona, it is the court's view that the law

of Arizona makes void all acts and business done by the plaintiff in Arizona, including the making of the lease. Sec. 53-802, Arizona Code, Ann. 1939; Restatement, Conflict of Laws, Sec. 167, p. 244, Comment a; Lowenmeyer vs. National Lumber Co., 125 N.E. 67; Martin vs. Banker's Trust Co., 18 Ariz. 55, 63, 156 P. 87, 90; National Union Indemnity Co. vs. Bruce Bros., Inc., 44 Ariz. 454, 38 P. 2d 648; Scott vs. Bruce Bros., Inc., 44 Ariz. 469, 38 P. 2d 654.

It Is Ordered, therefore, that plaintiff's motion for a new trial is denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Tucson Airport Authority, an Arizona corporation, and Knapp, Boyle, Bilby & Thompson, and Richard B. Evans, its attorneys:

Notice Is Hereby Given that Worcester Felt Pad Corporation, the plaintiff above named, appeals to the Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 9th day of December, 1953. (Plaintiff's Motion for a new trial having been denied by order of court March 24, 1954.)

Dated April 22, 1954.

C. WAYNE CLAMPITT,
A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,
Attorneys for Plaintiff

[Endorsed]: Filed April 22, 1954.

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD
ON APPEAL

It Is Hereby Stipulated by the parties that the record on appeal shall consist of the complete record and all the proceedings and evidence in the action, to-wit:

1. The Complaint.
2. The Answer.
3. All Motions and Orders before trial.
4. The entire Transcript of Testimony.
5. All exhibits.
6. Defendant's Motion for Directed Verdict.
7. Court's Direction of Verdict.
8. Plaintiff's Motion for new trial.
9. Order denying new trial.
10. Judgment.
11. Notice of Appeal.
12. This designation.
13. Journal entries.
14. All other proper parts of the Clerk's Record.

C. WAYNE CLAMPITT,

A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,

Attorneys for Plaintiff-Appellant

KNAPP, BOYLE, BILBY &
THOMPSON,
RICHARD B. EVANS,
/s/ By B. G. THOMPSON,
Attorneys for Defendant-Appellee

[Endorsed]: Filed July 19, 1954.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME OF APPEAL

The above named plaintiff having duly filed its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, and

The attorneys for the above named plaintiff and defendant contemplate by stipulation to be made agreeing upon the designation of the contents of the record on said appeal and thereby simplify and clarify the points in said appeal they deem important for review, and whereas

There is insufficient time now remaining for this stipulation to be agreed upon so that the Clerk may complete the preparation of the record on appeal within the period of forty (40) days, all without fault of either party or said Clerk,

Now Therefore It Is Hereby Stipulated that the plaintiff appellant make ex-parte application forthwith for an order of the District Court extending the time within which the record on appeal may

be filed, and the appeal docketed in said Court of Appeals to and including August 2, 1954.

C. WAYNE CLAMPITT,
A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,
Attorneys for Appellant
KNAPP, BOYLE, BILBY &
THOMPSON,

RICHARD B. EVANS,
/s/ By WILLIAM O. SCANLAND,
Attorneys for Appellee

[Endorsed]: Filed May 27, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It is by the Court this 28th day of May, 1954

Ordered: That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit in the above entitled action be, and it hereby is, extended to and including August 2, 1954.

/s/ JAMES A. WALSH,
Judge

Approved as to form:

KNAPP, BOYLE, BILBY & THOMPSON,
RICHARD B. EVANS,

/s/ WILLIAM O. SCANLAND,
Attorneys for Defendant-Appellee

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Worcester Felt Pad Corporation, a Massachusetts Corporation, Plaintiff, vs. Tucson Airport Authority, an Arizona Corporation, Defendant, numbered Civil 657 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the civil docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that said original documents, and said copies of the civil docket entries and of the minute entries, constitute the record on appeal in said case, as designated in the Stipulation Designating Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to-wit:

1. Civil Docket Entries, including Clerk's notation of entry of Judgment.

2. Complaint.
3. Answer.
4. Defendant's Motion to Produce.
5. Minute entries of December 8 and 9, 1953, proceedings of trial, including Court's direction of verdict.
6. Verdict.
7. Plaintiff's Exhibits 1, 2, 5, 8 and 9 in evidence.
8. Plaintiff's Exhibits 3, 4, 10 and 11 marked for identification.
9. Defendant's Exhibits D, E, F, G and H in evidence.
10. Defendant's Exhibit A marked for identification.
11. Plaintiff's Motion for New Trial.
12. Minute entry of March 24, 1954 (Order denying Motion for New Trial).
13. Plaintiff's Notice of Appeal.
14. Stipulation Designating Record on Appeal.
15. Reporter's Transcript, filed July 27, 1954.
16. Stipulation to Extend Time of Appeal.
17. Order Extending Time to File Record and Docket Appeal.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$5.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Prescott, Arizona, this 29th day of July, 1954.

[Seal] /s/ WM. H. LOVELESS, Clerk

In the United States District Court for the
District of Arizona

No. Civil 657—Tucson

WORCESTER FELT PAD CORPORATION, a
Massachusetts Corporation, Plaintiff,

vs.

TUCSON AIRPORT AUTHORITY, an Arizona
Corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances: Mr. A. S. Cutler and Mr. C. Wayne Clampitt, attorneys for plaintiff. Messrs. Knapp, Boyle, Bilby & Thompson, by Mr. B. G. Thompson and Mr. Richard Evans, for the defendant.

The above entitled case came up for trial before the Honorable James A. Walsh, Judge, and a Jury, on the 8th day of December, 1953, at Tucson, Arizona, and the following proceedings were had, to-wit: [1*]

The Clerk: Worcester Felt Pad Corporation, a Massachusetts corporation, plaintiff vs. Tucson Airport Authority, an Arizona corporation, defendant, Civil No. 657.

The Court: Is the plaintiff ready?

Mr. Clampitt: Yes, sir.

The Court: The defendant ready?

Mr. Thompson: Yes, sir, your Honor.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: The clerk will call the names of eighteen jurors. Ladies and Gentlemen, as your names are called will you come forward and take the seats which the bailiff will indicate to you.

(Jury panel sworn.)

The Court: Ladies and Gentlemen, the case that is about to go to trial today is a civil action. It is an action for damages or instituted by the Worcester Felt Pad Corporation, which is a Massachusetts corporation, that is, a corporation organized under the laws of the State of Massachusetts, and the Worcester Felt Pad Corporation bringing the action is called the plaintiff in the action. The action is brought against the Tucson Airport Authority, which is an Arizona corporation, a corporation organized under the laws of the State of Arizona. The Tucson Airport Authority is styled in the action the defendant. And, as I say, the plaintiff Worcester Felt Pad Corporation brings the action, sues the Tucson Airport Authority for damages. [2]

Very briefly what the case is about is this:

The plaintiff, the Worcester Felt Pad Corporation, says that back in the year 1949 it leased from the Tucson Airport Authority certain real property and premises for business purposes, that the lease was for a period of three years at a certain monthly rental, and the lease had also had options in it whereby the plaintiff, the Worcester Felt Pad Corporation, could continue in possession of the premises for three additional three year periods. In other words, at the option of the plaintiff, the

Worcester Felt Pad Corporation, it might extend its lease for nine additional years beyond the three year term.

The plaintiff also states and sets out that the lease contained a provision which provided that the lessee, that is the Worcester Felt Pad Corporation, recognized the right of the federal, state and local governments to restrict and limit the use of the airport by the Airport Authority, and these leased premises were on the airport, in event of national emergency, and in the event of such action depriving either the Lessee or the Lessor of normal enjoyment, agrees to a suspension or termination of the lease at the option of either the Lessor or the Lessee. They say further during the initial three year term, at a time in the initial three year term the defendant, Tucson Airport Authority, advised them by writing that the Federal Government desired or required the use of the [3] premises which the plaintiff was occupying, and that in truth and in fact the Federal Government didn't require those premises, but there was another private corporation, the Grand Central Corporation, that wanted to rent them for more rent than the plaintiff was paying.

The plaintiff says it had no knowledge of anything other than what the defendant represented to it. In other words, that the Government wanted the premises. So it agreed to a termination of the lease and moved out. It says it claims that by reason of the conduct of the defendant in causing it to terminate its lease under a misstating of the

situation, it lost the value of the lease; it was required to incur additional costs in its operations and had other damages, and asks to recover damages against the defendant.

Those are the claims of the plaintiff that I have been outlining to you. Those are the things the plaintiff claims.

On the other hand, the defendant, the Tucson Airport Authority, says the plaintiff did have a lease and did have the term and provision I have read to you in it, and it did give the plaintiff notice that the Government, the Federal Government, required the occupancy of the premises which the Felt Pad Corporation had been occupying. But it says, the defendant says, that was a fact and that it terminated this lease and retook possession of the premises strictly and only in accordance with the terms of the lease, and for that reason [4] it owes the plaintiff nothing.

Now, that of course does not exhaust all the issues between the parties but that in brief is an outline of the case that is about to be tried, and I have outlined it to you at this time because very shortly the Court will address certain questions to the jurors collectively and when I have finished interrogating counsel will do the same thing and your understanding of the case will be helpful in your ability to answer those questions.

The plaintiff, the Worcester Felt Pad Corporation, is represented in this action by Mr. Wayne Clampitt, an attorney from Tucson, who is the gentleman in the gray coat seated nearest the jury

box; and associated with him is Mr. A. S. Cutler, the gentleman to Mr. Clampitt's right, who is a member of the New York bar. Is that correct, Mr. Cutler?

Mr. Cutler: That is right.

The Court: The defendant, Tucson Airport Authority, is represented in this suit by Mr. B. G. Thompson, who is the gentleman at this table closer to me; by Mr. Richard Evans. Both Mr. Thompson and Mr. Evans are members of the Tucson bar. As I say, at this time the Court will address certain question to the jurors collectively and counsel will undoubtedly have some questions also.

I ask if the jurors' answer, prospective jurors' answer to a particular question would be in the affirmative, in other words, if you would answer any particular question "Yes" please [5] raise your hand so that particular line of inquiry can be pursued further.

I will ask first of all if any prospective juror is employed by either the defendant or the plaintiff. Is there any prospective juror employed by either the Worcester Felt Pad Corporation or Tucson Airport Authority.

Mr. James O. Nabours: Your Honor, I am employed by the City of Tuscon. What relation that has, it is connected, of course, with the Authority in some manner. I don't know what the bearing would be.

The Court: Mr. Nabours, I don't myself, but assuming there is some or there may prove to be connection between the defendant corporation and

the City of Tucson, would that fact influence you or cause you to lean to one side or the other in the case if you were chosen as a juror to try it?

Mr. Nabours: No, sir.

The Court: Could you, regardless of the fact you are employed by the City here, make up a verdict based solely on the evidence you got from the witness stand and the Court's instructions as to the law?

Mr. Nabours: Yes, sir.

The Court: And would you do that fairly and conscientiously if you were chosen to try this case?

Mr. Nabours: I would, sir.

The Court: Was there any other juror that indicated he [6] or she was employed by either the plaintiff or the defendant? Is there any prospective juror a member of whose immediate family is employed by either the plaintiff or the defendant, that is, the Worcester Felt Pad Corporation or Tucson Airport Authority, any member of your immediately family? Has any juror ever in the past been employed by one or the other of these corporations? Have any of you ever had employment with either of the parties to this suit, that is, Worcester Felt Pad Corporation or Tucson Airport Authority? Is there any prospective juror who does now or has in the past had any business relationships with either Worcester Felt Pad Corporation or Tucson Airport Authority? Any of you dealt with either of these corporations in a business way?

In there any juror who to his knowledge is acquainted with any of the managing officers of either

the Airport Authority or Worcester Felt Pad Corporation?

Mr. William S. Nicholas: I think as an ordinary citizen I know all of the Authority personally. I have no business or relationship with them.

The Court: That is a matter of having a social acquaintance?

Mr. Nicholas: Yes, and possibly past business over a long time, but not within several years.

The Court: Mr. Nicholas, would that acquaintanceship, the fact that you may have a social acquaintance with one or [7] more of the officers of the Authority, would that cause you to lean one way or the other in the trial of this case?

Mr. Nicholas: I don't think so. I merely put up my hand because you indicated.

The Court: That is what both Court and Counsel appreciate, Mr. Nicholas. So there will be no uncertainty or misunderstanding, you do not feel that acquaintance would have any bearing or influence you or cause you to lean to one side or the other of the case if you were chosen as a juror to try it?

Mr. Nicholas: I shouldn't think so.

Ruth A. Mayer: I have met Mr. Schmidt a couple of times, that is all.

The Court: I will ask you, Mrs. Mayer, would the fact you have met him at all prejudice you or bias you if you were chosen to try this case?

Mrs. Mayer: No.

The Court: You would, if chosen to try it, try

it fairly and impartially and be fair to both sides of the case?

Mrs. Mayer: Yes.

The Court: Was there any other juror that indicated he or she were acquainted with any of the managing officers of either corporation?

I have identified the counsel in the case, Ladies and Gentlemen, and I will ask if any of the lawyers have ever stood [8] in the relation of attorney to any of you, any of the lawyers in the case ever handled any legal matters for you?

Mr. Eugene R. Heap: Mr. Clampitt has.

The Court: Do you have any business at this time, Mr. Heap, in Mr. Clampitt's hands?

Mr. Heap: No.

The Court: That relationship is one that had been terminated?

Mr. Heap: Yes, sir.

The Court: The business is entirely finished?

Mr. Heap: Yes, sir.

The Court: And the fact that Mr. Clampitt had in the past been your attorney or handled some legal matters for you, would that influence you at all if you were chosen to try this case?

Mr. Heap: No.

The Court: You could and would try it just as fairly and impartially as if you had never met Mr. Clampitt?

Mr. Heap: Yes, sir.

The Court: Very well. Any other juror?

A Juror: I have been on committees with both the gentlemen concerned. I don't think either one

of them acted as my attorney, certainly not in any court case. I have conferred with both.

The Court: That is Mr. Thompson and Mr. Clampitt? [9]

The Juror: Both, mostly as committee work.

The Court: Would that influence you at all?

The Juror: I don't think so, both friends.

The Court: You are friendly with both of them and you would disregard friendship as your oath here required?

The Juror: I would have to be neutral, your Honor.

The Court: I take it probably many members of the jury have a social acquaintance with one or more of the lawyers in the case, local counsel, being of prominence here in Tucson, I am certain many of you have some social acquaintance with one or more of the lawyers or you may do some business with them apart from their representing you as your attorney. As to any jurors as to whom that may be true, that is, jurors who have a social or business acquaintance with any of the lawyers, I will ask if there is any juror in that situation that would be influenced or embarrassed at all by that acquaintance if he or she sat as a juror at the trial of this case? In other words, would that business or social acquaintanceship at all influence you or tend to embarrass you at all if you were chosen to try the case? Is there any prospective juror who has ever been a claimant for damages in a matter growing out of a landlord-tenant relationship? Any juror here ever been a claimant for

damages in a situation that grew out of a landlord-tenant relationship? Or has any prospective juror ever been a party against whom a claim for damages was made, [10] growing out of a landlord-tenant relationship?

(Mrs. Ruth Boyd raises hand.)

The Court: Was some damage claim made against you growing out of a landlord-tenant relationship?

Mrs. Boyd: No, sir. I have had some conditions where damages were made against my whole property by tenants, but it has never come to a definite action as yet.

The Court: You have never been a party to any litigation, I take it, where damages were sought growing out of a landlord-tenant relationship? In other words, as I understand you, Mrs. Boyd, some of your property has been damaged but there was no litigation growing out of it, is that correct?

Mrs. Boyd: It hasn't reached definite action as yet.

The Court: Well, that experience that you had, you have heard my outline of the case here, would that experience in any manner tend to influence you or cause you to lean one way or the other in the trial of this case if you were chosen as a juror?

Mrs. Boyd: No, sir.

The Court: Your personal difficulties would be something you could lay aside entirely and you could try this case and would try it under the evidence you got here and under the instructions of the Court as to the law?

Mrs. Boyd: Yes.

The Court: And you would be fair to both parties in the [11] case?

Mrs. Boyd: Yes, sir.

The Court: Is there any prospective juror who has a bias or prejudice one way or the other concerning a case of this type, that is, a case where damages are claimed, growing out of a landlord-tenant relationship? Does any prospective juror have any bias or prejudice one way or the other concerning cases of that type? Does any prospective juror have a bias or prejudice one way or the other concerning damage suits in general, that is, suits for damages in general? Has any prospective juror heard anything or read anything about this case or in any manner acquired any information about what the facts in the case are or what they purport to be, prior to coming here this morning?

Mr. Nicholas: It was in the newspapers some months ago, as I recall it. That is very vague.

The Court: You have a recollection of possibly reading some newspaper account of it?

Mr. Nicholas: Six or eight months ago or a year.

The Court: Would the reading of that article cause you to form or express any opinion one way or the other concerning the case?

Mr. Nicholas: No, just a news item.

The Court: Whatever you read wouldn't be in your mind or get any consideration by you if you were chosen to try this [12] case?

Mr. Nicholas: Not exactly, not as you described the case.

The Court: Does any juror know any reason whatever, whether I have averted to it or not, any reason whatever why she or he could not, if chosen to try this case, try it fairly and impartially, make up his or her verdict under the evidence as you got it from the witness stand and under the Court's instructions?

Counsel may examine.

Mr. Cutler: Does the fact this is a foreign corporation in Massachusetts suing an Airport Authority in Tucson, would that make any difference in your deliberation? Would you find it harder to find a verdict against a Tucson corporation and in favor of a Massachusetts corporation than if they were both equally residents of Tucson? Does the fact I am here in association with Mr. Clampitt and I am a foreigner, a New York lawyer, a city slicker, does that make any difference to you?

As far as the presentation of the facts, what his Honor tells you about the law and your deliberation about the case even if the city slicker represented a client that was right, could you find a judgment in his favor if you decide he was right? And would there be any prejudice because he was represented, in addition to my worthy friend Clampitt, by a stranger from New York? [13]

Does anyone, in addition to this lady, know Mr. Schmidt, because I will say to you frankly when it comes to our opening much of our case will depend upon the actions of Mr. Schmidt, who was the

manager of the Airport Authority, and I believe still is.

Mr. Nicholas: I know him, have known him for years.

Mr. Cutler: Do you feel, Mr. Nicholas, it would make any difference in your consideration of this case you would know Mr. Schmidt, and perhaps you knew him favorably, if you found in this case he acted improperly would you have more trouble finding against him because you knew him, than if his name was Jones and you didn't know him?

Mr. Nicholas: No. I know him socially, that is all. I don't know him in business.

Mr. Cutler: You don't feel that we require more to prove a case against Mr. Schmidt on behalf of the Airport Authority than if the man's name were Jones or somebody you didn't know, as far as your judging the case was concerned?

Mr. Nicholas: No.

Mr. Cutler: You have no prejudice against the fact that the defendant being sued here is a municipal airport authority? Do you feel you would require more evidence to hold such an Authority as Tucson Airport Authority liable than if it were an ordinary corporation doing business in the state here?

Mr. Nicholas: No. [14]

Mr. Cutler: Would your Honor permit me to address a question to the gentleman employed with the City?

The Court: Mr. Nabours?

Mr. Cutler: Yes, sir.

The Court: Surely.

Mr. Cutler: Does the fact, Mr. Nabours, that in this case the Federal Government gave the property to the City of Tucson for nothing and the City gave the property to the Airport Authority for nothing, and the Airport Authority is the defendant here, would that perhaps influence or prejudice your judgment of the City?

Mr. Nabours: No, sir.

Mr. Cutler: You feel you could try this case fairly and impartially and according to the evidence as you believe it as presented to you and under the charge of his Honor on the law?

Mr. Nabours: Yes, sir.

Mr. Cutler: That is all.

Mr. Thompson: May I ask a question of a single juror, the gentleman that indicated Mr. Clampitt represented him, Mr. Heap. Was that representation over a long period of time?

Mr. Heap: Just a substitution of my lawyer for one period.

Mr. Thompson: He substituted for your lawyer?

Mr. Heap: Yes, sir. [15]

Mr. Thompson: Were you connected with him over some considerable period of time?

Mr. Heap: Just one case.

Mr. Thompson: A short while?

Mr. Heap: Yes.

Mr. Thompson: You have stated, I believe, in answer to the Court's question that relationship wouldn't in anywise affect your deliberation in this case?

Mr. Heap: No, sir.

Mr. Thompson: Thank you, sir. We have no further questions.

Mr. Cutler: Will your Honor permit one question. Is the Mr. Boyle on this jury any relation to the Boyle in the law firm, Jim Boyle?

Mr. Thomas E. Boyle: No.

Mr. Cutler: Please forgive me for asking such a foolish question.

The Court: It might be more convenient if we recess briefly at this time. We will recess until five minutes to eleven. I will ask you to note the seats you are seated in now; when you return at five minutes to eleven, please take the same seats you are in now. While the jury has not been selected, I will ask you not to discuss the case among yourselves or with anybody else.

(Recess.) [16]

The Court: At this time the clerk will read the names of the twelve jurors who will try the case. As your names are called, will you please rise and remain standing until you have taken the oath.

(Jury called and sworn.)

The Court: Will the jurors in the box who are not going to set in this case retire to the body of the courtroom.

You may proceed with your statement.

(Opening statement by Mr. Cutler.)

(Opening statement by Mr. Evans.)

The Court: Call your first witness.

Mr. Robert Royston: If it please the Court, even though the Government has no interest in this

suit, may the record show my appearance from the United States Attorney's office, on behalf of this witness.

The Court: The record may so show.

JAMES L. PATTILLO

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cutler): Colonel, until about a half hour ago you had never met me or knew of my existence, did you? [17]

A. That is right.

Q. Now, you are the gentleman who wrote the letter of September 26, 1951, that was referred to by my opponent in his opening, were you not?

A. Yes, sir.

Q. Would you tell the Court and jury how it came about that you wrote that letter? Did you consult Grand Central or did they come to you?

Mr. Evans: Just a minute, if the Court please, we object to that as being completely immaterial and irrelevant. The letter was written and the Court will recall it is available here in court. Certainly any reason for writing it is immaterial at this time.

The Court: I think the letter possibly ought to be identified.

Mr. Cutler: All right, I will identify it.

The Court: You might also identify the witness.

(Testimony of James L. Pattillo.)

Mr. Cutler: All right, yes. I was trying to save time, perhaps foolishly.

Q. (By Mr. Cutler): Colonel, state who you are and what your position is.

A. James L. Pattillo, Colonel, United States Air Force, United States Plant Personnel, Grand Central Aircraft Company. Air Force Plant office.

(The letter referred to being Plaintiff's Exhibit 5 for [18] identification.)

Q. The letter is now marked as Exhibit 5, dated September 26, 1951. Is that the letter you are referring to? A. Yes, sir.

Q. Now, did you go to Grand Central or did Grand Central go to you on a request for this space?

Mr. Evans: We object to that as being immaterial and irrelevant, if the Court please. The letter speaks for itself. It is improperly identified. We are not bound by anything Grand Central may have done with Colonel Pattillo.

The Court: I don't get the materiality of it.

Mr. Cutler: The materiality is this, sir, if you will be patient with me, I want to show the jury——

Mr. Evans: If the Court please, if there is going to be an offer of proof I think it should be made outside the presence of the jury.

The Court: I will sustain the objection at this time. I will give you an opportunity to make an offer of proof on it outside the jury's presence.

Mr. Cutler: Will you give me an opportunity

(Testimony of James L. Pattillo.)

to discuss the materiality of the question I am asking?

The Court: Yes.

Q. (By Mr. Cutler): Now, did you have any consultation with anyone before you wrote the letter? A. Well, I talked to—— [19]

Mr. Evans: If the Court please, we would prefer a "Yes" or "No" answer.

The Court: You can answer that "Yes" or "No," Colonel.

A. Yes, sir.

Q. (By Mr. Cutler): With whom, please?

A. Some of the people at Grand Central.

Mr. Cutler: Now, I will not ask the question your Honor has sustained the objection on in any other form at the moment, I am going to wait for the opportunity to discuss it.

Q. Now, was it your intention at the time you sent this letter that that would be an authority on which the Tucson Airport Authority could base its removal of tenants from the airport?

Mr. Evans: If the Court please, we object to that question as being leading and being completely irrelevant and immaterial. The letter speaks for itself.

The Court: The letter speaks for itself.

Mr. Evans: It isn't ambiguous and the intention of the author has nothing to do with it.

Mr. Cutler: Wait a second. In the first place,

(Testimony of James L. Pattillo.)

I am reading word for word, without change, on his examination before trial——

Mr. Evans: Not in this court, if the Court please.

Mr. Cutler: Nevertheless it is an examination before trial in which he testified. That is No. 1. No. 2, there is [20] a vast difference between a Government directive and a request by Grand Central with Government acquiescence. At least that is material before the Court and jury, and if I can show this is a request by Grand Central and not a directive on the part of the Government; and he had no power to make this directive and no authority to do so, I believe I may do so through this witness.

The Court: The letter speaks for itself. What he may have intended by it, any undisclosed intention he may have had is certainly not binding upon anybody.

Mr. Cutler: May I ask him the question whether that was a directive on his part?

The Court: The letter speaks for itself. As to what it is, his interpretation of it is not material here.

Mr. Cutler: His authority to direct is material, isn't it? I beg your Honor's pardon. Would you consider I have the right to ask that question?

The Court: No, I think the letter speaks for itself. As far as the authority is concerned, the letter itself stated who wrote it, where he was and everything else.

(Testimony of James L. Pattillo.)

Mr. Cutler: May I not show his authority contemplated or encompassed no such right?

The Court: No, the letter will speak for itself.

Mr. Cutler: I don't know what else I can do about it except if you will give me an opportunity to present that [21] question more fully. However, if I can't I would ask you to read this examination. It is only a couple of pages. I am not departing from it one inch.

The Court: I am ruling on the basis of the way this matter arises here, and the ruling is the letter will speak for itself, that any intention or interpretation that this witness might have placed upon it in communicating to the defendant here is not material nor admissible.

Mr. Cutler: May I show lack of authority to send such a letter on the part of the man who sent it?

Mr. Evans: An attempt to impeach his own witness, if the Court please.

Mr. Cutler: That is not impeachment.

The Court: Maybe I can explain my view on it. The letter which was addressed to the plaintiff in this case stated who this man was, what his title was, where the letter came from. Now, there was no question raised by anybody as to the lack of authority. They were fully informed as to who this man was and what he purported to be when he wrote the letter. I don't see that authority enters into it.

(Testimony of James L. Pattillo.)

Mr. Cutler: But we are trying to demonstrate that too, he didn't have the authority.

The Court: If you can show that, that is another matter.

Mr. Cutler: One way of showing it is to first show he didn't have the right. That is what I am trying to show here. [22] Then I am going to show by other evidence not having the right—

The Court: On your avowal you will show they knew he had no authority?

Mr. Cutler: Yes, sir, I will try to show it.

Mr. Evans: Is counsel making an avowal to that effect?

The Court: That is my understanding.

Mr. Cutler: I say to the best of my ability I will be able to show they knew this wasn't a directive and that he had no authority to make a directive that was without his province.

Mr. Evans: It certainly doesn't constitute a sufficient avowal, if the Court please, as to what he believes he might prove. And if he wants to do that, why not go ahead in the usual order of proof and do it. The way we are now he has been stating here, in effect telling the jury everything he is going to prove and is getting the cart ahead of the horse.

Mr. Cutler: Except you are not letting me prove it.

The Court: Upon your statement you may proceed, if you can show lack of knowledge or authority on the part of the defendant.

(Testimony of James L. Pattillo.)

Mr. Cutler: Q. My question was——

Mr. Evans: May I interject this. Is it with the understanding if he doesn't connect this up it will go out on motion?

The Court: Yes, you may so move, of course.

Q. (By Mr. Cutler): Was your letter an official directive of any nature?

Mr. Evans: We object to that, if the Court please, upon the ground it is leading and again it is incompetent and irrelevant. The letter speaks for itself.

The Court: The letter speaks for itself.

Mr. Cutler: Your Honor will grant me an exception.

Q. Now, did you have any authority to make an official directive of any nature in your position as a colonel in the Army?

Mr. Evans: Now, if the Court please, we object to that upon the ground it is immaterial and you cannot prove agency or authority of an agent by the testimony of an agent.

Mr. Cutler: You can prove lack of authority by an agent.

The Court: Whether he could issue an official directive is immaterial here. I don't know what you mean by an official directive."

Q. (By Mr. Cutler): Did you have any authority to compel vacation of civil space in favor of a civil corporation, Grand Central?

Mr. Evans: May we make the same objection to

(Testimony of James L. Pattillo.)

this question upon the same grounds previously urged, if the Court please?

The Court: Objection sustained.

Mr. Cutler: I wish your Honor would give me an [24] opportunity to argue that. That is a very, very important part of the case.

The Court: I will hear you at the noon recess.

Q. (By Mr. Cutler): Tell us, Colonel, please, what were your duties at this air base?

A. I was the Air Force representative with Grand Central and in charge of the Air Force Office there at the Grand Central plant.

Q. Go a little more, please, if you will, and with the Court's permission, into what your duties were.

A. My office is responsible for the inspection, flight test and production and quality control work on the Government contracts there.

Q. Now, did you have any authority to direct a civilian organization such as the Tucson Airport Authority here, did you have any such authority?

Mr. Evans: We make the same objection, if the Court please.

The Court: The objection will be sustained.

Q. (By Mr. Cutler): Did you receive any instructions or authority other than the consultation with the Grand Central regarding the matter of obtaining space at the Air Base?

Mr. Evans: Just a moment. If the Court please, we object to that upon several grounds. To begin with it is a leading question; secondly, the question has in it facts not in [25] evidence, and, thirdly, it

(Testimony of James L. Pattillo.)

is immaterial and irrelevant as the letter speaks for itself. And the question of this man's authority is certainly known to everybody involved, as the exhibits will show.

The Court: I will permit him to answer that question. You can read it to him, if you will.

(The last question read.)

The Court: Answer that "Yes" or "No".

Mr. Thompson: Before he answers, there is no testimony of any consultation with anybody at Grand Central.

The Court: I believe he did testify he had some conference with Grand Central people.

Q. (By Mr. Cutler): Did you hear the question, Colonel? A. Yes, sir.

Q. Will you please answer it as the Court says, "Yes" or "No". A. No.

Q. Colonel, does any person in the Western Air Procurement District have authority to exercise an escape or recapture clause in a lease or sale?

Mr. Evans: We object to that, if the Court please, upon the ground no proper foundation has been laid. It calls for a conclusion of the witness or an opinion of the witness; as such it is irrelevant, immaterial and incompetent.

The Court: Objection sustained. [26]

Mr. Cutler: Until I can attempt to persuade your Honor on the other question I will have to keep the Colonel here until afternoon.

The Court: We will recess until 1:30 this afternoon. During the recess I will ask you not to dis-

(Testimony of James L. Pattillo.)

cuss the case among yourselves or with anybody else or make up your minds about the case until it is finally submitted to you. You may retire.

(Jury retires from courtroom.)

The Court: All right, sir.

Mr. Cutler: Now, let me take a simple instance and let me torture the point, if I may. Suppose a corporal in the Air Force sent a letter that Grand Central should take the space, would we be bound because it is a corporal when the corporal had no more authority to send a letter than I have.

The Court: Just a moment on that point. This letter when you got it, or your client got it, said that Colonel Pattillo, who had such and such a title, at such and such a place and such and such an address, had advised them that the Government required it. Now your people then and there knew who it was that had made the request, what his position was. Let's assume he had been a corporal, because in your case you were well advised at that time as to the authority of this man from what appears at this time.

Mr. Cutler: But we weren't.

The Court: But you certainly were. You were told who [27] he was, what his position was.

Mr. Cutler: That is all. We didn't know his authority.

The Court: Here's what you are attempting to do now. You at that time waived any inquiry into authority.

Mr. Cutler: I don't think so. Let me see if I can persuade you.

The Court: That is my point. If they had sent some Air Force officer or something like that, but they told you precisely who this man is.

Mr. Cutler: What difference does that make? Suppose it was a Major General?

The Court: It makes this difference. Upon his disclosure of who he is, so you know exactly what his position is, you act and move out of the place on that basis; it isn't my view of the law you can now come in and say, well, it is true we were advised who the man was, now we want to show he had no authority.

Mr. Cutler: If your Honor please, fraud has always permitted evidence to show reliance on a misrepresentation, whether relied on stupidly is a question for the jury. But certainly, it isn't a question of law. Let's see if I can make that clear. It doesn't make any difference to me if it was a corporal that wrote it or a Major General if the Major General will say he had no authority to write it, and nobody in the Western District had authority to write it, and he wrote [28] it as a favor for Grand Central and says that, and Grand Central procured it and obtained it and got it and I didn't know all that, and the Corporal and the Major General, I don't care who he is, wrote such a letter, may I not show that Corporal had no such authority?

(Testimony of James L. Pattillo.)

The Court: Not unless you show also that the defendant knew he didn't have the authority.

Mr. Cutler: I am going to show the defendant knew he had no such authority.

The Court: If you show that, of course, I have said if you will prove that I will permit it.

Mr. Cutler: I am going to try my utmost. I think I can prove it.

The Court: Let's do it this way. Let's proceed to prove the knowledge on the part of the defendant before we go into the matter.

Mr. Cutler: You realize, of course, your Honor, the defendant is a hostile witness and if I know him I am making my case, not the defendant, of course.

The Court: You can cross examine an adverse witness.

Mr. Cutler: I realize that, but he is still an adverse witness. But I think it is unfair to place that burden on me in view of this point.

The Court: I can shorten it up if you will avow you will show it, then I will permit you to go into authority right now; [29] if you can't and you can only tell me you hope to do it, I will deny you the opportunity to show knowledge on the part of the defendant before you go into the question of lack of authority.

Mr. Cutler: The only way I can, as an officer of this Court, avow I can show it is tell you I am going to put Mr. Schmidt on as my next witness, after I show you this man had no authority, re-

(Testimony of James L. Pattillo.)

requested to send it by Grand Central—and Mr. Schmidt is listening. I intend to try to prove through him——

The Court: In view of that statement it will be my ruling you show the lack of authority first or attempt to show it, then we will reach the question of authority after that.

Mr. Cutler: Lack of authority?

The Court: Lack of knowledge.

Mr. Cutler: Lack of authority is what I am trying to show now.

The Court: I will not permit you to go into lack of authority until you have first made your showing on knowledge of lack of authority on the part of the defendant.

(Further statement by counsel.)

The Court: I still have the same view, that is, that the matter of authority or lack of authority, unless you show that it was known to the defendant, would not be admissible here. And in view of the situation that you were not able to avow you can prove it, I can only see one thing to do in [30] fairness to all concerned, and that is let you make your attempt to show that knowledge on the part of the defendant.

Mr. Cutler: I am afraid I have not made the point in my clumsy and inept way. My point is: Whether they knew it or said something which was untrue and didn't know it, as far as fraud is concerned makes no difference. If I say: "This cow is sound and has good wind"—if that is the way

(Testimony of James L. Pattillo.)

you sell a cow—and I know it to be untrue, that is fraud. But if I say it and don't know it to be untrue, it is still fraud and I think I have a right to prove it that way.

The Court: Where as much knowledge as the defendant has about the authority of the Government agent is disclosed to the plaintiff?

Mr. Cutler: But you are deciding a question the jury should decide. I say respectfully that is a question of fact always in a fraud case.

The Court: No.

Mr. Cutler: All right. Thank you.

(Whereupon a recess was taken at 12:15 o'clock p.m. until 1:30 o'clock p.m.)

Mr. Cutler: If your Honor please, I would like to call the Court's attention to the case of Diamond Cattle Company vs. Clark, 116 A.L.R., 74 Pac. 2d.

The Court: I have read it. [31]

Mr. Cutler: I believe that is the authority for the point I made at recess. I don't want to repeat it now.

The Court: The ruling will stand. I am familiar with the case. It was cited to me on the pre-trial, so I have read it.

Mr. Cutler: Could I have your indulgence for about two minutes more. I wanted to possibly give you one more example. I don't think I should speak in the presence of the jury unless you want me to.

The Court: The ruling will stand. I will give you an opportunity at recess to pursue it further.

(Testimony of James L. Pattillo.)

Mr. Cutler: All right. Colonel, will you take the stand again, please.

(Colonel Pattillo resumed the witness stand.)

Q. (By Mr. Cutler): Did you have authority to demand space at the Tucson Airport?

Mr. Evans: We object to that, if the Court please, upon the ground it is immaterial, irrelevant, and upon the previous grounds urged.

The Court: The objection will be sustained.

Mr. Cutler: Then, Colonel, you will have to wait until I finish. [32]

ROBERT SCHMIDT

called as a witness herein, having been first duly sworn, testified as follows:

Examination by Mr. Cutler:

Q. Mr. Schmidt, you are the manager of the defendant airport? A. That is right.

Q. And you were in 1951 and prior thereto?

A. Yes, sir.

Q. Now, did you know that Colonel Pattillo had no authority to demand or take space?

A. No.

Q. Did you know whether he did have the authority? A. No.

Q. Did you investigate whether Colonel Pattillo had the authority to take space at the airport?

A. Yes.

Q. But on the pre-trial examination, instead of

(Testimony of Robert Schmidt.)

what you just said, you made the following answer to the following question:

“Question: You didn’t investigate whether or not the Air Force had authorized Mr. Pattillo to take this action?” And you answered, “No.” Right?

Mr. Evans: Hold that just a moment, Mr. Schmidt. If the Court please, is there a deposition of Mr. Schmidt in this [33] action?

The Court: Yes. Will you advise counsel——

Mr. Cutler: Page 28, line 12 to 15, are the exact words I just read.

Mr. Evans: All right. We misplaced our copy of the deposition.

(The last question was read.)

Q. (By Mr. Cutler): Is that true?

A. That was true at the time, yes.

Q. Was it true when you said it?

A. I had written the Civil Aeronautics Administration to find out.

Q. When you answered that question that way on the 12th day of June, 1952, in the deposition taken, was your answer to the question true?

A. It was at that time, yes.

Q. Has it become untrue since?

A. No.

Q. Now, you knew, of course, that Pattillo, Colonel Pattillo, said he did not have the authority to demand space, did you not?

A. I know that subsequent to his letter some months later he said he didn’t have the authority, yes.

(Testimony of Robert Schmidt.)

Q. You knew certainly when his deposition was taken in January, 1953, that he said he didn't have the authority then [34] to do it, didn't you?

A. I never read his deposition.

Q. You never read the deposition?

A. I have never seen his deposition.

Q. Are you familiar with the fact there was a case entitled Arizona Institute of Aeronautics——

A. Yes.

Q. ——against your company?

A. Yes.

Q. Of which you were the manager, this company? A. Right.

Q. And are you aware of the fact that in that case Colonel Pattillo's deposition was taken?

A. I have heard it had been taken, but I have not read his deposition.

Q. You are telling the jury you never read it although you knew it was taken?

A. That is right.

Q. You never discussed with the lawyers in this case the fact that Pattillo said in that deposition he had no authority to do it?

Mr. Evans: That is immaterial, if the Court please. He is attempting to get into evidence the matters in the deposition by improper manner. We certainly object to it.

The Court: He may answer this question. [35]

Mr. Evans: Anything he discussed with his attorney about it would be privileged in any event.

Mr. Cutler: It wouldn't be privileged for me to

(Testimony of Robert Schmidt.)

find out whether he knew it, I am sorry about that. Will you please repeat the question. I believe his Honor ruled he may answer.

The Court: Answer that "Yes" or "No."

(The last question was read as follows: "Question: You never discussed with the lawyers in the case the fact that Pattillo said in that deposition he had no authority to do it?")

The Court: Just a moment. He may answer.

A. Yes.

Q. (By Mr. Cutler): And you knew in September of 1953 that Pattillo hadn't requested that the space be taken over——

Mr. Evans: If the Court please——

Mr. Cutler: Wait a minute. May I finish my question, please?

Mr. Evans: I beg your pardon.

Q. (Continuing): But that Grand Central had requested Pattillo to take the space over, didn't you?

Mr. Evans: If the Court please, it is completely immaterial and irrelevant what the witness knew in September, 1953. This all transpired in 1951.

Mr. Cutler: I meant September, 1951. Forgive me. I am talking about the time of the letter. Is there any objection now to the question? [36]

Mr. Evans: Change the time to 1951?

The Court: 1951.

Mr. Evans: No, if he knows we have no objection.

Mr. Cutler: It wasn't necessary for you to say

(Testimony of Robert Schmidt.)

that, please. I don't want you to intimate what he should say.

A. I wish you would restate that again.

Mr. Cutler: Would you re-read him the question?

(The last question was read.)

A. I can't answer that question the way it is worded.

Q. I will ask the Court to direct you to answer the question "Yes" or "No."

The Court: Read him the question again.

(The last question was read.)

Mr. Evans: That doesn't make sense, if the Court please. The question says that you know he didn't do it, but it says that he did do it.

Mr. Cutler: If the question didn't make sense, it didn't make sense before and you didn't object. Are you objecting now?

Mr. Evans: I certainly am.

Mr. Cutler: All right. We will have it determined.

The Court: The objection will be sustained.

Q. (By Mr. Cutler): Didn't you know that Pattillo hadn't requested the space?

A. I don't understand the nature of the question. [37]

Q. You have been in Air Force work how long?

A. I got a letter from him——

Q. Excuse me, please. You have been in Air Force work how long?

A. I haven't been in Air Force work at all.

(Testimony of Robert Schmidt.)

Q. What kind of work have you been doing for the last fifteen years? A. Airport work.

Q. I beg your pardon. Airport work. You have been at it how long? A. Since 1929.

Q. And you are pretty familiar with the ways of the CAA, the CAB and all the other initials relating to airports, aren't you?

A. Reasonably so, yes, sir.

Q. You are telling me now you don't understand my question, which is, whether you knew whether Pattillo had requested the space?

The Court: Just a moment. Requested from whom? I think that is the difficulty he has with your question.

Mr. Cutler: Requested from Tucson Airport Authority.

The Court: If you will include that in the question.

Mr. Cutler: Yes, sir, I do include it in the question.

A. I got a letter dated the 26th of September——

Q. I didn't ask you that. I will ask for a "Yes" or "No" [38] answer, please. I don't want to go into the letters yet. I will go into the letters. I will give you a chance to talk about the letters. I would like that question answered, please.

A. Well, your Honor——

The Court: The question is, Mr. Schmidt, did you know in September, 1951, that Pattillo had

(Testimony of Robert Schmidt.)

requested the space from the Tucson Airport Authority?

A. I didn't know it until I got the letter. That is what I am trying to make clear.

Q. Didn't you know that Grand Central had requested Pattillo to request the space?

A. No.

Q. Didn't you know that it was Grand Central that was requesting the space and not the Government?

A. Not in that exact light, no, sir.

Q. Didn't you know that the Government didn't need to request the space, it could take the space without compensation, didn't you?

A. It could take it with or without compensation.

Q. And you recognize, Mr. Schmidt, a difference between the Grand Central taking it over, don't you?

A. Yes.

Q. And, as a matter of fact, in the letter of September 26 Pattillo again and again referred to Grand Central taking the [39] space, is that right?

Mr. Evans: We object to that, if the Court please, upon the ground the letter is the best evidence.

Mr. Cutler: I certainly may have the operation of his mind on the letter, best evidence or not best evidence.

The Court: The letter is the best evidence.

Mr. Cutler: If your Honor pleases, I make this offer of proof.

(Testimony of Robert Schmidt.)

Mr. Evans: I object to it being made within the presence of the jury.

Mr. Cutler: I will make it outside the presence of the jury.

The Court: Very well. Ladies and Gentlemen of the Jury, counsel have indicated they desire to take up a legal matter with the Court which can only properly be done in the absence of the jury. I will ask you to remain outside until the bailiff calls you to return.

(The jury retires from courtroom.)

The Court: I might say to counsel, if you desire to examine the witness about a letter the first thing we should do is have the letter in evidence.

Mr. Cutler: I intend to.

The Court: It is not in evidence. Then if you desire to direct his attention to something in the letter our practice is to hand it to him, give him an opportunity to see what it is [40] you desire his attention directed to.

Mr. Cutler: Of course ours is a different practice. I have to conform to your practice. But I now want to state what my offer of proof is. There is no jury present.

In the letter of September 26, 1951, there are fifty ten references to whom was taking over the space, Grand Central. However, this man in writing of what that letter said, not sending the letter to us as your Honor said in some of our discussion before, but writing of the contents of that letter, said not the Grand Central was taking the

(Testimony of Robert Schmidt.)

space over on a rental basis, but the Government had demanded the space. I want the jury to know why he transposed that language and if he didn't do so knowingly, in view of his already given testimony, that he knew Pattillo didn't have the authority and that he didn't know who had requested, and so forth. That, it seems to me, is very clearly admissible. I would certainly do it the way you suggest, but it is admissible.

The Court: There is no argument about that. It is a matter of how we proceed.

Mr. Cutler: All right. I will take it the way you want me to take it, of course. I don't want because I am inept here to have my client deprived of his rights.

The Court: No. The whole thing is a matter of procedure. Call the jury.

(Jury returns to courtroom.) [41]

Mr. Cutler: May I offer in evidence, your Honor, in order to conform with proper procedure in this court, the letter of September 26, 1951, which is already conceded to be a proper order. It is marked on the back as Exhibit No. 5.

Mr. Evans: We have no objection to that offer.

The Court: It may be received in evidence.

(Plaintiff's Exhibit 5 in evidence.)

Mr. Cutler: I will now offer in evidence the letter of the witness to the plaintiff, dated October 18, 1951, likewise in evidence already as Exhibit—that is in the pre-trial, but marked Exhibit 2.

Mr. Evans: No objection.

(Testimony of Robert Schmidt.)

The Court: It may be admitted.

(Plaintiff's Exhibit 2 in evidence.)

Mr. Cutler: Am I permitted to read this letter to the jury?

The Court: Surely.

Mr. Cutler: Will you please read it to them, Mr. Clampitt?

(Plaintiff's Exhibit 5 read to the jury as follows:)

"Air Force Plant Office, Grand Central Aircraft Co., Glendale Region, Western Air Procurement District.

"September 26, 1951, Tucson Airport Authority, Tucson Municipal Airport, Tucson, Arizona.

"Gentlemen:

"This office would like to inform you as to present office [42] and storage space requirements of Grand Central Aircraft Co. and ask your cooperation in their relief. The piecemeal but continued additions to Air Force programs in work at Grand Central have repeatedly caused the company to out-grow facilities. Continued growth, again, causes Grand Central to be faced with a need for additional office and storage space.

"It appears the lack of a firm, overall plan for Air Force programs at this plant has caused Grand Central's space requirements to grow at an uneven and unpredictable rate and your generous efforts to accommodate both the company and the Gov-

(Testimony of Robert Schmidt.)

ernment have been at considerable inconvenience to yourself. The way in which you have recognized the urgency of these programs and, in spite of the inherent uncertainty of their futures, made space available to Grand Central is gratifying. At present, the Air Force is endeavoring to expand to meet the overall defense program which Congress has authorized and a very important segment of that expansion depends on the airplanes which Grand Central is reconditioning locally. The size of recent Congressional appropriations for Air Force expansion, the immediate need the Air Force has for additional bombers, and the fact that a substantial number of B-29's cocooned at Davis-Monthan Air Force Base are not yet contractually committed, all contribute to the Air Force's desire that Grand Central increase the rate of its local output and continue to for some time to come. This office regrets that even [43] at this point it is unable to give you an intelligent and detailed plan of programs the Air Force will want or be able to put into work at this plant in the years ahead, however, it is expected they will be quite large.

"As indicated above, Grand Central, in its efforts to meet the Air Force's changing requirements, now finds itself in need of additional office and storage space. Based on present programs and the little information this office has on future programs for this facility, it is requested that all undercover space on Tucson Municipal Airport occupied by the AAF and Consolidated-Vultee during World

(Testimony of Robert Schmidt.)

War II be made available immediately for rental or lease by Grand Central Aircraft Co.

“It is requested that this letter and its contents be handled as a confidential matter.

“Very truly yours, James L. Pattillo, Lt. Colonel, USAF, AF Officer-in-Charge.”

Mr. Clampitt: I will now read you——

Mr. Cutler: Wait a minute.

Q. (By Mr. Cutler): Now, with your twenty-four years experience in airport work, Mr. Schmidt, you knew the difference between Grand Central taking it over for rent and the Federal Government taking it, did you not? A. Certainly.

Q. And there is a distinction, isn't there? [44]

A. The letter came from the Air Force——

Q. Please. I don't want to hear any more now. Is there a distinction? A. Yes.

Q. You heard the letter head by Mr. Clampitt, the attorney of record here, to the jury, did you?

A. Yes.

Q. You heard the repeated references to Grand Central taking the space, did you?

A. Certainly.

Q. Did you not in the letter in evidence dated October 18 written by you, did you not say that the Federal Government requires the use of certain space? A. Certainly.

Q. Did you give a copy of this Grand Central letter of September 26 that is now in evidence to

(Testimony of Robert Schmidt.)

the plaintiff when you sent the letter of October 18?

Mr. Evans: We object to that, if the Court please. It assumes a fact not in evidence. The true fact is, it is a letter of Colonel Pattillo not the Grand Central's letter.

Q. (By Mr. Cutler): It was marked "Grand Central." At any rate, it is the exhibit. Withdrawn.

Did you give in your letter of October 18 a copy of the exhibit that is now in evidence, marked Plaintiff's Exhibit 5? A. The letter—— [45]

Q. Did you or didn't you?

A. I don't recall.

Q. Will you read the letter and see whether you did? You don't recall?

A. I would like to read the exhibit.

Q. Do you recall? A. I don't.

Q. Now, you may look at the letter marked Exhibit 2 and see whether that refreshes your recollection.

A. There is no indication a copy of it was transmitted with it.

Q. You know now you didn't send a copy of the Pattillo letter?

A. Not at that time at least.

Q. You know that, do you?

A. Yes, sir.

Q. Now, you did refer to the letter of September 26, didn't you? A. Yes.

Q. In your letter of October 18, both in evidence? A. Yes.

(Testimony of Robert Schmidt.)

Mr. Cutler: Now may I have the exhibit, the second one which has not been read, read to the jury, your Honor?

Mr. Clappitt: This is a letter with the heading: "Tucson Municipal Airport." [46]

(Plaintiff's Exhibit 2 was read to the jury as follows:)

"October 18, 1951, Registered Mail, Return Card.

"Mr. Julius Brauer, President, Worcester Felt Pad Corporation, 11 Brackett Court, Worcester, Massachusetts.

"Dear Mr. Brauer:

"Reference is made to the agreement dated the 1st day of March, 1949, by and between Tucson Airport Authority and Worcester Felt Pad Corporation and to our letters of June 3, 1950, and December 30, 1950, reflecting its modification with respect to change of space to be used by you.

"Your attention is invited to provision (4) of the aforementioned agreement which reads:

" "The lessee recognizes the right of the Federal, State and Local Governments to restrict or limit the use of the Airport by the City of Tucson and/or Tucson Airport Authority in the event of national emergency, and in the event of such action depriving either the lessee or the lessor of normal enjoyment, agrees to a suspension or termination of the lease at the option of either the lessor or

(Testimony of Robert Schmidt.)

the lessee. In the event of termination, the lessee shall have the right to remove all of his property within thirty days after termination, but all items remaining after thirty days may, at the lessor's option, become its sole property.'

"Tucson Airport Authority has been formally advised under date of September 26, 1951, by the Officer-In-Charge, Air Force [47] Plant Office, Grand Central Aircraft Company, Glendale Region, Western Air Procurement District, that the Federal Government requires the use of certain covered space on Tucson Municipal Airport which includes all of the space now occupied by you. This request has been verified by the Chief, Airport Division, Civil Aeronautics Administration, Los Angeles, by a communication dated October 9, 1951, as an action consistent with the demands of the national emergency and one which constitutes an exercise of proper authority for the use of said space.

"Accordingly, by virtue of action by the Board of Directors of Tucson Airport Authority on October 17, 1951, the writer has been instructed, authorized, and empowered to notify you that the agreement dated March 1, 1949, is, therefore, to be terminated on October 31, 1951, and the space now occupied by you is to be vacated in its entirety no later than November 30 in accordance with the last sentence of provision (4) cited hereinbefore.

"We regret the necessity of this action, but we know that you fully recognize that the interests of

(Testimony of Robert Schmidt.)

national defense must transcend personal considerations.

“Yours very truly, R. W. F. Schmidt.”

Q. (By Mr. Cutler): Now, Mr. Schmidt, was there some reason in your mind why you preferred in the letter of October 18 not to send Pattillo's letters to them, but to draw your own conclusions as to what that letter meant? [48]

A. My conclusion was based on the statement——

Q. Excuse me. I didn't ask you that. You are not answering my question, if I may be so bold. Was there some reason? A. No.

Q. It just happened you didn't send it, is that it? A. Right.

Q. And the statement that the Federal Government wanted the property was a conclusion that you drew, not in Pattillo's letter, was it not?

A. I can't answer that “Yes” or “No.” I have to qualify the answer.

Q. And isn't that the reason why you didn't send a letter? A. No.

Q. Of September 26 in your letter of October 18? A. No.

Q. Now, in the pre-trial examination did you not make the following answers to the following questions—I am reading from page 25 and when I get to another page, I am going on from there, I will let you know.

“Question: All you know, then, regarding their

(Testimony of Robert Schmidt.)

actions,” “their” being specified in the previous question as Duckworth or Pattillo, “in the taking over of property and speaking for the Federal Government in the demanding of possession of property, it is hearsay, is it not? It is what someone else told you? [49] “Answer: Yes.

“Question: Has either Duckworth or Pattillo at any time, since you have been manager of the Tucson Municipal Airport, demanded of you the possession of any part or portion of the Municipal Airport on the ground that they are an agent of the Federal Government and order it?

“Answer: Yes.

“Question: Do you have the document, page 26, that you referred to? “Answer: Yes.

“Question: What is the date of that document?

“Answer: September 26, 1951.”

That is the same document from Pattillo that is now in evidence to which we just referred, is it not?

A. Yes.

Q. I am on page 27:

“Question: Now that demand, I believe you said, was in September?

“Answer: September 26, 1951.

“Question: Now, that letter was the basis for your registered letter to the Worcester Felt Pad Company dated October 18, 1951, in which you notified the Worcester Felt Pad Corporation that their lease was terminated under the provisions of provision 4 of their lease?

“Answer: Partially. [50]

(Testimony of Robert Schmidt.)

“Question: Was any other demand served upon you by any other agency of the Federal Government?

“Answer: Colonel Pattillo’s letter of September 26, 1951, was referred to the Civil Aeronautics Administration for a ruling as to whether or not the request constituted a valid exercise of authority.

“Question: Was the Civil Aeronautics Administration Mr. Pattillo’s superior officer or agency over him?

“Answer: No. The instruments of transfer to the City of Tucson covering the property in question recite the Civil Aeronautics Administration as the guardian and service agency in such matters and would be and is the agency to which the municipality or public airport owner would look for a determination.

“Question: In other words, you assumed that Mr. Pattillo had the legal right to speak for the Air Force, United States Air Force?

“Answer: We contacted the Civil Aeronautics Administration to find out if the request was a valid request.

“Question: You didn’t investigate whether or not the Air Force had authorized Mr. Pattillo to take this action? “Answer: No.

“Question: The Civil Aeronautics Administration is not over Mr. Pattillo and does not direct his activities?

“Answer: Only to the extent that the statutes prescribe procedures to be followed. [51]

(Testimony of Robert Schmidt.)

“Question: Isn’t the United States Air Force an independent agency of the Federal Government not in any way connected with the Civil Aeronautics Administration?”

“Answer: I presume it is an independent agency, yes.”

Q. Page 29:

“Question: Do you know if the Air Force consulted the CAA in connection with this matter that Mr. Pattillo made demand?”

“Answer: No.

“Question: Did the Civil Aeronautics Administration inform you that they had made any consultation or request to them?”

“Answer: No.

“Question: Did you ask the Civil Aeronautics Administration whether the United States Air Force had consulted them at all about this?”

“Answer: No, no.”

Mr. Evans: If the Court please, I haven’t found any contradictory statements yet——

Mr. Cutler: Excuse me, please. That is a very improper statement for you to make, you know it is improper——

Mr. Evans: If the Court please——

Mr. Cutler: You have no right to argue——

The Court: Just a moment, just a moment. Let counsel address his remarks to the Court. [52]

Mr. Cutler: I beg your Honor’s pardon. I object to comments at this time during the trial by my opponent.

(Testimony of Robert Schmidt.)

Mr. Evans: We want to enter an objection, if the Court please, to any further reading——

Mr. Cutler: I don't object to the objection. I object to the comments. The time to argue the case is when we get to the jury.

The Court: Go ahead and state your objection.

Mr. Evans: I object to any further reading from the deposition of Mr. Schmidt taken on June 12, 1952, upon the ground there has been no proper foundation laid; upon the additional ground the matters counsel is reading from the deposition of that date are not contradictory in any manner, do not constitute legitimate evidentiary matters for impeachment or any other purposes.

The Court: The objection will be sustained. That is, I will direct counsel not to go into questions or answers that are not impeaching.

Mr. Cutler: I had intended to stop right there anyway.

The Court: Very well, there is no harm done.

Mr. Cutler: That is why I can't stop him from making the objection, but I still believe that argument is not proper at this point. That is all I objected to and I was wrong in stating it to him instead of stating it to you.

Would your Honor indulge me for half a moment? [53]

The Court: Surely.

Mr. Cutler: I offer in evidence the letter of October 4, 1951, signed by Schmidt on behalf of the

(Testimony of Robert Schmidt.)

defendant and addressed to Pattillo, and thus far called Exhibit B.

The Court: Is counsel familiar with that letter?

Mr. Evans: Not offhand. Yes, I recall it.

The Court: Any objection to it?

Mr. Evans: No objection.

The Court: It may be admitted.

(Plaintiff's Exhibit 8 in evidence.)

Mr. Clampitt: For the record I call the clerk's attention to the fact this is Defendant's Exhibit B which is now being marked Plaintiff's Exhibit 8, is that right?

The Clerk: In evidence.

Mr. Clampitt: Thank you.

Mr. Cutler: Could I ask your Honor's indulgence to the extent of reading this letter?

The Court: Surely.

Mr. Cutler: You read it, please. Your Honor, of course, will listen to it.

Mr. Clampitt: I am reading, of course, Plaintiff's Exhibit 8 in evidence.

(Plaintiff's Exhibit 8 was read to the jury as follows:)

"Tucson Airport Authority, P. O. Box 1191, Tucson, Arizona, October 4, 1951. [54]

"Lt. Colonel James L. Pattillo, AF Officer-In-Charge, Grand Central Aircraft Company, P. O. Box 5072, Tucson, Arizona.

"Dear Sir:

"Reference is made to your letter of September

(Testimony of Robert Schmidt.)

26 requesting for and in behalf of the Air Force 'All of the undercover space on Tucson Municipal Airport occupied by the Army Air Force and Consolidated-Vultee during World War II' for rental or lease to Grand Central Aircraft Company.

"Although I did not have this communication in hand, as the result of our previous conversations and earlier requests from Grand Central Aircraft Company itself, I discussed the overall problem at length with the Airports Advisory Committee and with members of the Airports Use Panel, the latter group including fully authorized personnel of the Air Force, Navy, CAA, CAB, et cetera, in Washington last week.

"Taking your letter literally, that is, 'all covered space', would, of course, terminate civilian operation at this airport, an action which is contrary to the present intent of the Departments of National Defense and Commerce and which would require condemnation proceedings in the courts to establish values for reimbursement by the Government so that other facilities could be developed to serve the scheduled air carriers, the crop dusters, executive aircraft owners—both transient and local—the facilities of the U. S. Weather Bureau and the Civil Aeronautics Administration, the flight [55] schools and charter operators, and finally Tucson Airport Authority itself. The Wichita Municipal Airport case is cited as an example of this type of proceeding, and if this be your

(Testimony of Robert Schmidt.)

intent, the Department of Justice should then be appraised of your wishes.

“However, in the absence of a clear-cut determination as to probable use of this facility (one which I certainly was unable to obtain from an assortment of Air Force representatives in Washington, which is also expressed as an unhappy fact in your letter), and in view of the policy declared by each representative of each agency—that civil aviation is to continue to operate without undue imposition and hardship, and that joint civil and military occupancy is ordinarily an attainable goal—I am taking the liberty of making a broader interpretation of your letter, namely, that we proceed to make available all covered space ‘formerly occupied’, et cetera, where it is legally permissible and physically practicable for us to vacate or secure vacancy thereof for the purpose stated.

“You understand that leases will have to be terminated by due notice, that protests may be filed, and that negotiations toward favorable settlement will require time. Without assurances from the Air Force or Grand Central that Tucson Airport Authority will be reimbursed for any losses incurred by such actions, we must necessarily proceed with care.

“I have already asked for opinions from the Civil [56] Aeronautics Administration as to the feasibility and legality of the several steps which we may take, and at the next meeting of our Board of Directors on October 17th, I shall present the

(Testimony of Robert Schmidt.)

entire problem as basically portrayed in your letter of September 26th. There are, as you know, several possible courses open to us, but each represents a policy determination which must have Board action.

“As you have indicated and as I again repeat, we are entirely sympathetic with the problems which confront the Air Force and Grand Central Aircraft Company, and we shall make every effort to accede to your mutual requests within the limits of our legal and moral responsibility to operate and maintain well-rounded airport facilities for greater Tucson.

“Yours very truly, R. W. F. Schmidt.”

Q. (By Mr. Cutler): Just one more question, Mr. Schmidt, and I shall be done with you. You didn't send a copy of the letter of October 4, Exhibit 8, Plaintiff's, just now read to the jury, to the plaintiff either, did you? A. No, sir.

Q. Nor the letter of September 26, 1951, of Pattillo's?

A. Not that I recall, no, sir.

Q. This was a private correspondence between you and Pattillo?

A. I wouldn't say it was private correspondence, no.

Q. Was it private as far as the plaintiff was concerned? [57]

A. Our files are open to the public.

(Testimony of Robert Schmidt.)

Q. I didn't ask that. Was it private so far as the plaintiff was concerned? A. No.

Mr. Cutler: That is all.

Examination by Mr. Evans:

(Defendant's Exhibit C marked for identification.)

Q. Mr. Schmidt, I hand you a copy of the exhibit marked Defendant's Exhibit C for identification and ask you if you can tell us what that is?

Mr. Cutler: I don't understand the question.

Mr. Evans: I am asking him to identify the exhibit, Counsellor.

Mr. Cutler: What exhibit? What do you mean?

Mr. Evans: Exhibit C, Defendant's Exhibit C marked for identification.

Mr. Cutler: You mean to identify it by stating what it is?

Mr. Evans: I am asking him to identify the exhibit, not to read it.

Mr. Cutler: All right.

A. Yes, sir, I am familiar with that.

Q. And what is it?

A. It is a letter from Colonel Pattillo directed to the [58] Airport Authority.

Q. Acknowledging receipt of your letter of October 4, 1951, which is in evidence as Plaintiff's Exhibit 8? A. Yes, sir.

Q. Calling your attention——

Mr. Cutler: Is that an exhibit now?

Mr. Evans: It has not been offered, no.

Mr. Cutler: I don't know, is it the proper prac-

(Testimony of Robert Schmidt.)

tice for you to get the contents of a letter identified without first offering it in evidence and saying what you say it says?

Mr. Evans: We generally, of course, here we have to identify it before we can offer it in evidence.

Mr. Cutler: But you have identified it by stating a conclusion what it is. Don't you have to offer it in evidence before you may?

The Court: I think he did identify it as a letter from Colonel Pattillo, acknowledging——

Mr. Cutler: May I see it, then?

Mr. Evans: Certainly.

Mr. Cutler: Are you offering it?

Mr. Evans: I am not offering it in evidence, no, not at this time.

Mr. Cutler: Well, then, I think your Honor should strike out on my motion the characterization of the letter, it was an acknowledgment of the letter, until the letter is in [59] evidence. There is much more in it than that.

The Court: May I see it?

Mr. Cutler: That is only three lines but there is more.

Mr. Clampitt: I call the Court's attention this did not appear in the pre-trial.

The Court: That is true.

Mr. Evans: If the Court please, I will ask him to identify it by the addressee and the signer——

The Court: The jury will disregard all the wit-

(Testimony of Robert Schmidt.)

ness' answer except it is a letter addressed to Tucson Airport Authority by Colonel Patillo.

Mr. Cutler: Thank you, sir.

Mr. Thompson: And the date, if it please the Court.

The Court: Under date of October 10, 1951.

Q. (By Mr. Evans): Was the original of this letter received by you, Mr. Schmidt?

A. Yes, sir.

Q. Calling your attention, Mr. Schmidt, to the plaintiff's Exhibit 5 in evidence, which you will recall was the letter of September 26, 1951, of Colonel Pattillo addressed to the Tucson Airport Authority, was Colonel Pattillo's request in that letter its contents be handled as a confidential communication, is that correct? A. Yes.

Mr. Evans: That is all. [60]

Re-Examination by Mr. Cutler:

Mr. Cutler: I now offer in evidence the letter my friend didn't offer.

Mr. Evans: We have no objection whatsoever.

The Court: It may be admitted.

Mr. Evans: I am assuming he is referring to the letter of October 10.

Mr. Clampitt: The Defendant's Exhibit C for identification will now be marked Plaintiff's Exhibit——

The Clerk: 9 in evidence.

Mr. Evans: We have no objection.

(Testimony of Robert Schmidt.)

The Court: Plaintiff's Exhibit 9 in evidence.

(Plaintiff's Exhibit 9 in evidence.)

Mr. Cutler: Would your Honor permit me to read these three lines to the jury?

The Court: Very well.

Mr. Cutler: Addressed to the Tucson Airport Authority on the stationery of Colonel Pattillo:

"I would like to express our appreciation for your very considerate letter of 4 October 1951 and ask that you advise this office as to the Board's decisions in this matter. Very truly yours, James L. Pattillo, Lt. Colonel, USAF, AF Officer-In-Charge."

Q. (By Mr. Cutler): Did you send a copy of this letter to the plaintiff? Did you? [61]

A. No.

Mr. Cutler: That is all.

Mr. Evans: No further questions.

J. LESLIE HANSEN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cutler): Mr. Hansen, please state your business?

A. I am a real estate appraiser, realtor appraiser.

Q. How many years have you been in that business?

(Testimony of J. Leslie Hansen.)

A. I have been in the real estate business since 1924 and appraising professionally since 1938.

Q. Will you state some of your professional connections and the companies and institutions and Government agencies and authority that you have appraised properties for?

A. I have appraised properties for the Valley Bank, the First National Bank, the Reconstruction Finance Corporation, the Reclamation Bureau, the State of Arizona, Life Insurance Companies, savings and loan associations, individuals, lawyers.

Q. Life insurance companies, including Equitable Life and Commercial Life and the Benefit Insurance Company, Kansas City Life of Dallas? [62]

A. Yes, sir.

Q. Of Dallas another one?

A. That is Southland Life; Occidental Life Insurance Company, Metropolitan Life Insurance Company, Massachusetts Mutual Insurance Company.

Q. And have you done work for five years, from 1941 to 1946, for the Federal Housing Commission?

A. Yes. Yes, part time was at per diem matter and part time was as part of the staff for the Federal Housing Administration, being sent here in 1946 to take charge of the appraisal office in the State of Arizona.

Q. Was that appraisal work appraisal of realty?

A. Yes.

(Testimony of J. Leslie Hansen.)

Q. I notice the initials "M.A.I." on your card. What does that mean?

A. That means I am a member of the American Institute of Real Estate Appraisers.

Q. And how many are there in the whole state of Arizona that are such appraisers?

A. There are four.

Q. How many are there in the whole country?

A. Something like fourteen hundred and thirty.

Q. What real estate appraisal or real estate boards, and so forth, do you belong to?

A. I belong to the Arizona State Association of Real Estate [63] Boards, the Phoenix Real Estate Board and by its affiliation the National Association of Real Estate Boards. I am a senior member of the Society of Residential Appraisers and also a member of the American Institute of Real Estate Appraisers.

Q. Of what association were you president for two terms?

A. I have been president of two different chapters of the Association of Residential Appraisers.

Q. Where was that?

A. One in Chicago and one in Phoenix.

Q. Phoenix, this state, Arizona?

A. Yes, sir.

Q. Are you also a licensed real estate broker?

A. Yes, sir, I am a licensed real estate broker and realtor.

Q. And have you in your career lectured on appraisals in Arizona, in Chicago and other cities?

(Testimony of J. Leslie Hansen.)

A. I have.

Q. Now, have you appraised in the state of Arizona leaseholds, realty and property that comes under the classification of real estate?

A. All the time.

Q. Have you appraised in this city, in Tucson?

A. I have.

Q. In Flagstaff and Prescott and Bisbee and Pima County, Santa Cruz County?

A. State-wide. [64]

Q. Incidentally, it was you that appraised the El Conquistador, wasn't it?

A. That is right, in May, 1951.

Q. In May, 1951? A. Yes.

Q. How did it happen you appraised that? Did you appraise it for somebody?

A. For the Southland Life Insurance Company of Dallas, Texas.

Q. What name?

A. The Southland Life Insurance Company of Dallas, Texas.

Q. You also appraised part of the Grand Canyon in Arizona, I believe you told me that?

A. That is right. There was one little piece of ground left and I believe there are two appraisers that have made appraisals of Grand Canyon property, and I happen to be one of them.

Q. Now, are you familiar with the property here in issue, that is, the property that the plaintiff leased from the Tucson Airport Authority at the airport in Tucson, Arizona? A. I am.

(Testimony of J. Leslie Hansen.)

Q. Have you seen it? A. I have.

Q. Now, what steps did you take in formulating an opinion about its value in November of 1951, at or about the time when the plaintiff received notice it must vacate? [65]

A. By making comparisons with it and other property that were leased at that time, checking back as to rentals in effect at that time, with both the lessor and lessee, and comparing it in general with other properties with equal advantages and disadvantages.

Q. Now, how much square footage was involved here in the case before this Court and jury?

A. By the lease, 12,920 square feet, more or less.

Q. And you have seen that?

A. I have seen it.

Q. Was that typical factory and office space or was it better than typical or a typical, if I may use such a big word, I don't even know what it means?

A. I would say it was better than typical industrial space and not quite so good as modern office space, but certainly better than typical industrial space.

Q. Tell the jury what in your mind as a real estate expert and appraiser in the state, made it better than typical space?

Mr. Evans: If the Court please, may we have permission to ask a few questions of the witness on voir dire?

(Testimony of J. Leslie Hansen.)

The Court: Very well.

Mr. Cutler: Is that before I have completed the examination?

Mr. Evans: He asked him for an opinion.

The Court: Yes, you have asked for an opinion. I am [66] going to permit counsel at this time to ask a question on voir dire.

Mr. Cutler: All right.

Q. (By Mr. Evans): Mr. Hansen, when did you see the property covered by the lease between Tucson Airport Authority and the Worcester Felt Pad Corporation?

A. Last Friday, December 5, I believe it was.

Q. Of this year? A. The 4th. Yes.

Q. Can you state of your own personal knowledge that the property at that time was in the same condition it was in in November, 1951?

A. I can state what the authorities that showed me the property told me.

Q. In other words, on the basis of what someone told you you have figured out what it was like two years ago?

A. On the basis of what they told me and showed me as the space, this partition and that partition.

Mr. Cutler: By "they" you mean the defendant authority?

The Witness: That is right.

Mr. Evans: Is it all right if I go ahead now?

Mr. Cutler: Thank for the sarcasm. You may, if you ask my permission.

(Testimony of J. Leslie Hansen.)

Q. (By Mr. Evans): Who told you what the property was like two years ago? [67]

A. Chief Morgan of the Fire Department showed us one section and Mr. Broman, of your office, of the Airport Authority office, took Mr. Klafter and myself over there again Saturday, no, yesterday, Monday.

Q. You and Mr. Klafter were there together?

A. Yes.

Q. And did someone tell you the improvements that had been made on the property at the time it was vacated?

A. May I add something. Mr. Brauer was also with us.

Q. Mr. Brauer of the plaintiff company?

A. That is right.

Q. He also told you?

A. He showed us. Between Mr. Broman and Mr. Brauer we were shown and told what had been deleted and the shape it was, and so forth.

Q. I think you said in addition to that in your investigation to arrive at your opinion in this matter you checked back on rentals that were in existence here in 1951?

A. That is right.

Q. You checked with both lessees and lessors?

A. That is right.

Q. You mean other lessors and lessees around the city?

A. Yes, sir.

Q. Of course that goes into making up the opinion you arrived at? [68]

(Testimony of J. Leslie Hansen.)

A. That is right, a guide to forming my opinion, yes, sir.

Mr. Evans: We are going to object, if the Court please, to this witness giving any opinion as his answer discloses he is basing it at least in some portion on hearsay, extra judicial statements.

The Court: The objection will be overruled. Read him the last question.

(The last question by Mr. Cutler was read as follows: "Question: Tell the jury what in your mind as a real estate expert and appraiser in the state, made it better than typical space?")

A. I did answer the question, Counsellor. I believe that question was answered.

Q. (By Mr. Cutler): All right, I will go on to the next question. You spoke of Mr. Bowman, what is that name?

A. Broman, I believe.

Q. Who is Mr. Broman?

A. The man that apparently had the know-how to get us around without any difficulty.

Q. Isn't he Mr. Schmidt's assistant?

A. I believe he is.

Q. All right. Have you told us yet what made this space in your opinion better than typical factory or office space?

A. We have discussed that part of it very little with him. I don't believe I have told you. [69]

Q. It isn't me. Have you told the jury and the Court? A. No.

Q. Would you please, if you could, and with

(Testimony of J. Leslie Hansen.)

the Court's indulgence take a minute to tell us that, please?

A. We examined—Mr. Counsellor, may I answer the question in my own words as to the method and process of taking this——

Mr. Cutler: I will sit down.

A. We took the lease, of course, and we didn't see the original lease but we saw a copy of it and studied it and its provisions. And we looked at the space. We also looked at comparable space and compared the advantages, as I said a moment ago, and disadvantages and we find that the subject space is very desirable, in fact, it is practically office space in connection with a shop or factory type building. It has several rows of fluorescent lights; it has an overhead sprinkling system; it has wood floors; it has evaporative cooling and forced air, blower-type heating; wood floors with linoleum coverage; excellent washroom and restroom facilities. And also being located at the airport with the environment and the ability of the employees to use the lounge downstairs in the lobby and the restaurant facilities made the space very attractive from the standpoint of an employer because of the good possibilities of contented employees, and by comparison of other space without these facilities and interpolation we formed an opinion of the rental value per square foot per [70] month per year.

Q. So I reduce it now to the single question, you have formed an opinion as to the fair reasonable rental value of this space in or about the month of

(Testimony of J. Leslie Hansen.)

November or December 1, 1951, at the time the plaintiff had received on October 31, 1951, a notice to vacate in thirty days? Have you formulated such an opinion? A. I have.

Q. Please state what that is?

Mr. Evans: May the record show the defendant's objection, if the Court please, upon the ground there is no proper foundation laid, the answer is incompetent in that it is based in part on what the witness has learned by extra judicial hearsay conversations.

The Court: The record may show the objection and the same ruling.

Q. (By Mr. Cutler): Did you understand the question? A. Yes, I have an opinion.

Q. We are now up to what it is.

A. In my opinion the rental value as of that time of this space is ten cents per square foot per month.

Q. Now, extending ten cents per square foot per month by 12,920 square feet, how much is that per month?

A. We have two rates to talk about, Mr. Counsellor. We have a three year period or six year period at \$100 a month. [71]

Q. That is right. I haven't come to that. We will make the deductions later. At this time extend what you said was the fair reasonable rental value then to a monthly basis for the number of square feet. A. \$1,292 per month.

Q. If you take off the \$100 per month which the

(Testimony of J. Leslie Hansen.)

defendant agreed to pay, the difference is how much? A. \$1,192 per month.

Q. And how much is that per year?

A. \$14,304 per year difference.

Q. Now, there came a time under this lease where, after a certain number of years, the amount the plaintiff was to pay would increase slightly, didn't it? A. Yes, sir.

Q. How much did it increase by?

A. It increased by 25 per cent during the third three year period, from the sixth to the ninth year, under the options of the lease.

Q. You mean from the sixth to the ninth year in the future?

A. From the beginning of the lease.

Q. From the beginning of the lease?

A. Yes, sir.

Q. That made a difference of \$300 a year, \$25 a month, didn't it? A. That is right. [72]

Q. That still left during that third period how much difference between the reasonable rental value you found and the \$125 a month the plaintiff was required to pay?

A. \$14,004 per year.

Q. \$14,004 per year? A. Yes, sir.

Q. Did you extend that out to the term of the lease still remaining after the plaintiff was compelled to vacate by the defendant in and about December 1, 1951?

A. Did I extend it out? I didn't quite understand the question.

(Testimony of J. Leslie Hansen.)

Q. I mean did you multiply the term of the lease still to run from then on, what was it, how many years?

A. Three more years, an option for three more years at \$125 a month. It would be the same rate of difference, \$14,004.

Q. How much was left of the unexpired portion of the lease which plaintiff was entitled to by his agreement that is now in evidence, the lease agreement?

Mr. Thompson: I object to this witness testifying what is in the lease.

The Court: The objection is sustained.

Mr. Cutler: May he not say how many years?

The Court: The lease is the best evidence of that. Here is a man that has read it. The lease is pleaded, it is admitted. I believe those particular terms are admitted in the [73] answer.

Q. One more question. Will you state what the full difference is for the full unexpired term of the lease?

A. I haven't figured it in dollars and cents for the full period.

Q. All right. I will give you an opportunity to figure it. You may go ahead.

Mr. Thompson: I don't understand the last question. Will you read it to me?

(The last question was read.)

Mr. Thompson: That requires the same assumption. I assume counsel is required to get the figures

(Testimony of J. Leslie Hansen.)

from the lease himself and make the computation. He isn't competent to construe the lease at all.

Mr. Cutler: It has nothing to do with the lease.

Mr. Thompson: What period are you talking about?

Mr. Cutler: The period of the lease which you wouldn't let me tell the jury.

The Court: That is all admitted in the pleadings. This is just a matter of calculation. He has testified to the reserve rental; he has testified to his opinion of the rental value. It is a matter of calculation.

Mr. Cutler: It is admitted under the pleadings there is nine years and seven months to go on the lease and I believe I have the right to ask him to extend the nine years and seven [74] months times the number of months difference. It is a matter of calculation.

The Court: I am going to permit him to calculate it just to get it done. You can do it or if you want the witness to do it.

Mr. Cutler: I would like to have it done. Would you calculate it then, please?

The Witness: This is going to take a little longer.

Mr. Cutler: I will withdraw the question. Sometime during the progress of the trial I will calculate it and ask my opponent to stipulate it is the right calculation.

The Court: Very well.

(Testimony of J. Leslie Hansen.)

Mr. Cutler: I have completed my direct examination of this witness.

Cross Examination

Q. (By Mr. Evans): You say the space you saw there at the airport had a total area of 12,920 feet, more or less?

A. I didn't say that, sir.

Q. You didn't say that? A. No, sir.

Q. Did you see the area that Worcester Felt Pad Corporation—— A. Yes, sir.

Q. How many feet were there? [75]

A. There were approximately 11,000 or 10,000 in the area we looked at and he had additional space in another spot. We were shown two places that he had had. I quoted the 12,920 square feet more or less from the lease. That was the space available to them and he showed us the space in this bay and we checked approximately, but I am not prepared to say that I saw 12,920 square feet. I saw approximately 10,000 square feet in one bunch and was told he had additional space there are security regulations on. We didn't go every place. We had to get batches. And I saw another space in approximately the same area that he had been moved from.

Q. At what time?

A. That I can't say. That is the space the Fire Chief showed us.

Q. Mr. Hansen, you say that you can't tell us whether or not you saw all of the space that was

(Testimony of J. Leslie Hansen.)

occupied by the Worcester Felt Pad Corporation at the time they were moved out?

A. I didn't say that either.

Q. Did you see all that space?

A. I saw approximately all the space.

Q. How much of it did you not see?

A. I might not have seen 2,000 square feet, I am not prepared to say. I saw approximately the amount of area, but as to whether they had 12,920 square feet in what was shown me, I am not prepared to testify to the exactness of it. [76]

Q. You based your opinion on the value of the lease upon the assumption that everything else they had there was the same as what you saw?

A. Not on any assumption. I based my opinion of the value on the fact they had a right to 12,920 square feet.

Q. Was it covered space?

A. Under the roof, all of it.

Q. Were you told originally they had only 3,400 square feet?

A. I heard you say that today, that is the first time.

Q. You never heard that before?

A. No, sir.

Q. I will ask if that were the case, if that was the space they were entitled to under their lease, would that make a difference in your calculations?

A. No, because I read the lease. That is your statement. The lease says he had 12,920 square feet available.

(Testimony of J. Leslie Hansen.)

Q. Does it say it is covered?

A. It doesn't say it isn't covered.

Q. Does it say it is covered?

A. It doesn't say it isn't covered. When you see a lease that a man has so many square feet and you see a building where he has space, why should I assume it is anything but what the lease calls for.

Q. Normally to arrive at any opinion as an expert in a case of this type you generally like to see the space they are [77] supposed to have?

A. I did see the space they had last, Mr. Counsellor, but it was exactly 12,920 square feet, because of security regulations and all, I wanted to see the classifications, the type of space so I could make a comparison. It is up to my client to know whether or not he is paying for space he isn't using. He had available to him under the terms of the lease 12,920 square feet of space. Whether he got 9,000 or 11,000, I don't care. He had 12,920 available to him under the terms of the lease. That is what I base my calculations on.

Q. You don't know what 12,920 square feet he had available to him?

A. I saw awfully close to it in the last space he occupied.

Q. Did you see the space he occupied at first when the lease was first made, at the beginning period of the lease, commencing June of 1949?

A. I don't know whether I saw that space. I saw the space that the Fire Chief showed us, that he told us was the last space. That was when Mr.

(Testimony of J. Leslie Hansen.)

Brauer was there, because he said the Fire Chief had showed us the wrong space. And we went back Saturday to verify and find the space he had occupied last.

Q. You, of course, saw the lease?

A. I saw a copy of it in counsel's hand.

Q. And the lease described an area between columns 1 and 20, containing approximately 12,920 square feet, more or less, right?

A. I presume that is right. I don't have a copy in front of me, but I believe that is right.

Q. Let me hand this to you so we are not making any mistake about it. Handing the witness the exhibit attached to Plaintiff's complaint, which purports to be a copy of the lease between the plaintiff and the defendant.

A. Yes.

Q. Now then, did you see the property or premises between columns 1 and 20?

A. On the west side of the hangar?

Q. West side of lean-to or hangar No. 2?

A. I don't know whether I did or not.

Mr. Evans: That is all.

Redirect Examination

Q. (By Mr. Cutler): Did you see the space the plaintiff vacated in 1951?

A. I understand from the plaintiff and Mr. Schmidt's assistant, Mr. Broman and from the Fire Chief they had been moved several times, or twice

(Testimony of J. Leslie Hansen.)

prior to their going out, so I couldn't identify which particular space——

Q. Did you see the particular space in which they last were, from which they were vacated, which is involved in this lawsuit? [79] A. I did.

Mr. Cutler: That is all.

Recross Examination

Q. (By Mr. Evans): Did you measure it?

A. I paced it off, Mr. Counsellor.

Q. And came up with 10,000 square feet?

A. Approximately 10,000. That is the reason why I don't want to say I didn't see twelve or that I didn't see ten.

Q. You don't know whether, yourself, that is the same area that is covered by the lease between these parties or not?

A. I believe it is. I believe it is. I had the plaintiff there with me who told me that was the space he occupied and I had Mr. Broman, the assistant manager, who said that was the space they occupied.

Q. Let's put it a different way. You don't know of your own knowledge whether it is that portion of the second floor or the west lean-to of hangar No. 2, between columns 1 and 20?

A. I wouldn't say to that.

Q. You don't know?

A. I wouldn't say that either. They had several spaces. Under the terms of their lease they could be moved. If you read the lease further, they could be moved anywhere the airport authority wanted

(Testimony of J. Leslie Hansen.)

to move them. Now, I don't care [80] particularly whether I saw the original space as long as I saw the space that is of the type they had and the last space they occupied.

Q. But you didn't care how much area it was within a couple of thousand feet?

A. Wait a minute. I said my client was entitled to 12,920 square feet. That was up to him to see he had it. I saw the type of space he had; I assumed that was 12,920, but I am not prepared to testify on the stand that I got exactly 12,920 square feet.

Q. Wouldn't you also have to assume that the 12,920 square feet that he was entitled to at the time when he was put out was the same type of 12,920 square feet of space that he had when he originally took the lease?

Mr. Cutler: I object to that. It is not only argumentative but has nothing to do with the case. It is the space we were made to vacate. He says he saw that space. What difference does it make what he originally occupied?

The Court: He may answer. Read him the question, will you, please?

(The last question was read.)

A. No.

Q. You have covered space and uncovered space which is the more valuable or is it just exactly of the same value for the purposes the Worcester Felt Pad Corporation used it? [81]

A. Mr. Counsellor, there was no uncovered space in that there was no roof. There was space in open

(Testimony of J. Leslie Hansen.)

ranges or open parts. For instance, on one side part of the space originally had was open on the side into the hangar. I was told, I didn't see it in 1951, but I was told. And they piled merchandise up to form a wall. The space I saw now had a wall along the hangar, that is, I saw both sides of the east hangar, the east hangar or the west, I am a little bit confused. The one where the American Airlines and the restaurant are, whichever that is.

Q. East side, I believe. Wouldn't there be a difference in value between covered space and uncovered space?

A. Will you please—I am not trying to be difficult—would you explain what you mean by “uncovered” space.

Q. Didn't have a roof on it.

A. It all had a roof on it.

Mr. Evans: Read him the question before that.

(The question was read as follows: “Question: Wouldn't there be a difference in value between covered space and uncovered space?”)

Mr. Cutler: I object to that now on the ground it is immaterial. In testing his credibility they could ask, but he has already said there is no uncovered space.

The Court: No, he may answer.

A. Mr. Counsellor, without being difficult with you, would [82] you explain by “uncovered” space do you mean space in the yard as compared with space in the building?

Q. Space without a roof over it.

(Testimony of J. Leslie Hansen.)

A. That would be the yard, wouldn't it?

Q. You are the expert, Mr. Hansen.

A. I have never heard of space being called uncovered space other than in a yard. Space is space and if it has a roof over it and walls it is space, and if it is out in the open it is yard and classed at a different rate. Some of these regions we investigated had a rate of one cent per square foot for yard space.

Q. Let me ask you this. In arriving at your valuation are you assuming that the plaintiff in this case was entitled to occupy 12,920 square feet of space which you describe as practically office space?

A. I would like the clerk to read that question again.

(The last question was read.)

A. I don't think, Mr. Counsellor, in answer to your question, he was entitled necessarily to the type of space that he occupied last. Under the terms of the lease he had space in that building and I saw two classes of space, one that was almost comparable and one that was superior.

Q. You saw those loft spaces there in the hangar?

A. That is what this was. This space was all in the loft space. [83]

Q. Did you see any of the loft space that was just open out on the side?

A. Without any partitions, you mean?

Q. Yes. A. No.

Q. In other words, in arriving at your valuation

(Testimony of J. Leslie Hansen.)

of the rental value of that property in 1951 you assumed that the loft space was all enclosed, isn't that true?

A. I didn't assume. I was told it was by the assistant manager of the airport, and I so considered it was.

Q. You based your opinion on that fact?

A. Yes, sir.

Q. That it was enclosed? A. Yes, sir.

Q. If it had not been enclosed in November of 1951, would that have made a difference in your opinion?

Mr. Cutler: I object on the ground that is supposititious, nothing to do with the case, nothing to do with the facts in evidence.

The Court: No, he may answer.

A. Not necessarily, it may and may not. We took into consideration, Mr. Counsellor, its comparison as factory space compared with other factories that are around town, and we came to the conclusion we had to go to the higher rate of office rent. Some of this stuff without partitions, although [84] I didn't see any space without partitions in that loft. I didn't see open sail loft type of warehouse. And I don't know that he ever occupied it from his own statements. But if he had a space that was open like we are talking about, I believe we are talking about the same type, at least I am trying to be cooperative, on the space that was open into the side of a hangar which is open, I would say that

(Testimony of J. Leslie Hansen.)

space is less valuable than the space that is office space.

Q. How much less valuable?

A. Perhaps two and a half cents a foot by virtue of what I saw up there.

Q. You would say the space that was not enclosed would for factory purposes be worth seven and a half cents a square foot?

Q. Now you are getting me down to fine points. What do you mean by not enclosed?

Q. Open out into the hangar?

A. With no partitions at all?

Q. With no partitions furnished by the landlord?

A. But with conditions as they were in that building with the sprinkler and other emoluments I saw?

Q. Yes.

A. Yes, I would say it was worth seven and a half cents per square foot per month.

Q. For factory space or office space?

A. For utility industrial space. Like manufacturing, [85] assembling, whatever you might be calling "factory." I believe we are talking about the same thing now.

Q. Were you ever advised as to the standard published rates charged by the Tucson Airport Authority for occupancy of space at the airport?

A. I didn't seek it, sir.

Q. You did not seek it?

A. No, sir.

(Testimony of J. Leslie Hansen.)

Q. Wouldn't that be some evidence of reasonable rental value of the space?

A. No, not necessarily. It could be, but not necessarily.

Q. You feel better evidence of that would be to go into some other neighborhood and ask what space rented for in that area than at the point where the land was actually located?

A. Mr. Counsellor, we were comparing thirteen thousand, approximately, square foot area. We were not comparing five hundred thousand square foot space such as in those hangars. When a tenant makes a deal for 500,000 square feet of space it is entirely a different concept because they have all this space they will get the additional space at so-and-so. For that reason I didn't feel the rate they charged, which you quoted this morning, charged Grand Central four cents a square foot for that space was a comparable rate, because we would compare thirteen thousand, ten thousand and lesser and greater spaces and we have a thirteen thousand space tenant. [86]

Q. How far was this property from town?

A. About eight or ten miles.

Q. And with what other property did you compare it?

A. We compared it with Park Avenue Sundt stuff, Sears & Roebuck warehouse, a dozen or more.

Q. That is all located down in the industrial part of town?

A. Yes, sir. We took that into consideration, the

(Testimony of J. Leslie Hansen.)

advantages and disadvantages. We couldn't find this made—I don't want to go further than you want me to, but he didn't need any rail facilities in his type operation. It is fine for truck shipments, for labor policy, everything was in his favor for his particular type operation.

Q. Better to get help to go out eight or ten miles?

A. He got people fairly local in their location.

Q. You have been told that?

A. I suppose so.

Q. You considered what you were told in arriving at your opinion?

A. I sure did.

Q. All right, sir. Now, the rentals you checked with—

A. May I add one thing to that?

Q. Let me finish then you can. The rentals you investigated in order to arrive, or that you used in arriving at your opinion, in arriving at the value at the airport are the same as over at Park, 16th Street and 17th, and Factory Avenue, [87] which are Sundt's properties, Sears & Roebuck properties, and properties of that type, is that true?

A. No, not entirely. You are misstating part of it. You are putting straight warehouse properties in conjunction with the same field with people doing assembling and retail shipping. I took all types of property into consideration. We took these you speak of, straight warehouse. We threw out some comparable but the rate was out of line, we disregarded that one.

(Testimony of J. Leslie Hansen.)

Q. You mean if it were lower or higher either way you disregarded it?

A. No, if it were low or high for the space, not for our case, but the space under consideration.

Q. I mean if you found somebody occupying some space that seemed like too low a rental for you, you disregarded it?

A. No, not at all.

Q. Or if it was one you felt they were paying too high for you disregarded it?

A. No. You are putting a different interpretation on my statements, sir, and I can't permit that.

Q. What piece of property did you look at here in the city where they had an assembling and shipping operation of the type you were informed was operated by the plaintiff in this case?

A. I didn't find any operation I would say conformed to the [88] space operated by the plaintiff. That is what I tried to make clear in the first place. We compared the advantages and disadvantages with the space we looked over. We talked, for instance, to the owner of the paper company over here, Graham Paper Company, and he told us all the conditions of his rate. He had to build his own office space and he had his paper stock and he did his shipping from there and paid so much a square foot.

Q. What did he pay?

A. He paid five cents a square foot.

Q. Five cents. That is all.

(Testimony of J. Leslie Hansen.)

Redirect Examination

Q. (By Mr. Cutler): Did you consider that five cent space as good as this space?

A. No.

Q. Do you understand a yard, open space, to be on the second floor of a building?

A. No.

Q. Did you read the lease, which says: "****that portion of the second floor of the west 'lean-to' of said hangar No. 2, including one stairway, two toilets and one freight elevator, situated between columns one (1) and twenty (20) containing twelve thousand nine hundred twenty (12,920) square feet, more [89] or less; * * *"

A. We considered that.

Q. You didn't find any open space that has been talked about at the space rate represented by the plaintiff?

A. No, sir.

Q. Have you been paid for coming here to testify?

A. I hope to be.

Q. Have you made arrangements for what you hope to receive?

A. Yes, sir.

Q. Please state what it was?

A. I get \$100 a day.

Q. From the time you came here to look at the property?

A. For my preparation and court appearance.

Q. Is that a fair and reasonable fee for the services as given?

A. I hope everybody will consider it so, I do.
Mr. Cutler: That is all.

(Testimony of J. Leslie Hansen.)

Mr. Evans: That is all.

The Court: At this time we will take the afternoon recess. Please remember the admonition given to you before. Don't discuss the case among yourselves or make up your minds about the case.

(Recess.) [90]

MARK H. KLAFTER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cutler): Please state, Mr. Klafter, what your business is.

A. I am a real estate broker and appraiser.

Q. And how long have you been such?

A. I have been in the real estate business continuously in Tucson since 1941.

Q. And an appraiser how long?

A. For the past eight years.

Q. Do you make your office in Tucson?

A. Yes, sir.

Q. Where?

A. At 650 North 6th Avenue.

Q. Have you always made your office in Tucson in the past eleven or twelve years?

A. Yes, sir.

Q. State with what professional associations you are affiliated?

A. I am a member of the Real Estate Board of Tucson, Arizona Association of Realtors and Na-

(Testimony of Mark H. Klafter.)

tional Association of Real Estate Boards, National Association of Real Estate Brokers. [91] I am a senior member of the Society of Residential Appraisers.

Q. Aren't you chairman of some committees on appraisal, in appraisal associations or real estate boards?

A. I have been a member of the Appraisal Committee of the Real Estate Board of Tucson since 1948. I have been chairman of that committee since 1950.

Q. During those years have you familiarized yourself with real estate, leases, fee property in Tucson, Arizona? A. Yes, sir.

Q. Including industrial, factory and warehouse and housing and other space? A. Yes, sir.

Q. Did you examine the space here in issue?

A. Yes, sir, I did.

Q. When?

A. On Friday, December 4 and yesterday.

Q. And—let's see if we can shorten it—do you agree with the statement of the previous witness as to the exceptional facilities of this particular space? A. Yes, sir, I do.

Q. Now, have you formed an opinion as to the reasonable rental value of the space which the plaintiff occupied and which the plaintiff was forced by the defendant to vacate on or about December 1, 1951? A. I have. [92]

Q. Will you give us with a reasonable degree of certainty, if you will, what in your opinion was

(Testimony of Mark H. Klafter.)

a fair and reasonable rental value of said space on or about December 1, 1951, the time plaintiff vacated?

Mr. Evans: We object to that, if the Court please, on the ground it is incompetent. There has been no proper foundation laid to show that this witness has any knowledge to the condition of the premises in 1951. He said he saw the property last week and the week before.

The Court: I think the objection will be sustained at the present time.

Q. Did you see the property the plaintiff vacated? A. Yes, sir, I did.

Q. Do you know where it is?

A. Yes, sir.

Q. Where is it?

A. It is on the second floor of the east hangar at the southern portion of the east hangar at the Tucson Airport Authority Building.

Q. What does it consist of?

A. The second floor space currently is divided up into a great number of offices, partitions of which are removable. It is space which could be used for any type of assembling or manufacturing operation or for office space.

Q. Did you confer with some representative of the defendant [93] as to whether that space is in substantially the same condition it was in November, 1951?

A. Mr. Charles Broman, who was the assistant manager of the Tucson Airport Authority showed

(Testimony of Mark H. Klafter.)

me the space yesterday and pointed out the partitions which were there when the Worcester Felt Pad Company was the tenant, and showed me the partitions which were put in place after they vacated.

Q. So that from that you were able to visualize what it was they had, the plaintiff had, from which it was vacated on or about December 1, 1951?

A. Yes, sir.

Q. What efforts did you make to find what values were, or what did you know about real estate values, including especially leasehold of comparable industrial space to this in November, 1951?

A. I went to the owners and lessees of numerous industrial and warehouse space in Tucson to find out what that type space was leasing for so that I could compare it with the subject space and make an intelligent comparison. In other words, some of it was inferior—none of it was superior.

Q. Did you confine your studies or did you include in your studies the 1951, December 1 valuation as well as present valuations?

A. Those were the only valuations I took into consideration.

Q. And in addition to that, is it not true you kept yourself [94] familiar as a live real estate broker and appraiser in the city of Tucson, Arizona, of leasehold industrial values, property similar to this, in December, 1951?

A. I was familiar with values at that time.

Q. I will repeat the question. I am repeating

(Testimony of Mark H. Klafter.)

the question, what in his opinion was a fair reasonable value in December, 1951, with a reasonable degree of certainty?

Mr. Evans: May I ask the witness one question on voir dire.

The Court: Certainly.

Q. (By Mr. Evans): In arriving at your opinion in response to the question Mr. Cutler asked you, did you take into consideration the information that you gathered from other persons not parties to this lawsuit as to what comparable facilities were renting for in 1951?

A. Did I take that into consideration?

Q. Yes.

A. I took into consideration the information the owners and tenants gave me.

Q. Owners and tenants who were not parties to this lawsuit? A. That is correct.

Q. And information which was given to you outside the presence of any officers of the Tucson Airport Authority?

A. They had nothing to do with it, naturally.

Mr. Evans: We object to it, if the Court please, on the [95] ground no proper foundation is laid. It is incompetent in that the witness indicated at least part of his opinion is based on hearsay statements made outside the courtroom.

The Court: Objection is overruled. He may answer.

A. In my opinion the space had a reasonable

(Testimony of Mark H. Klafter.)

value as of December 1, 1951, of ten cents per square foot per month.

Mr. Cutler: You may examine.

Cross Examination

Q. (By Mr. Thompson): Now, you say, Mr. Klafter, as I understand it, it was implied in one of the questions this was exceptional space. In what way did you say it was exceptional?

A. I didn't say, but I will now. It is exceptional in that it is the only space available in the Tucson area that has facilities such as second floor with wood floors, linoleum covering, wiring and conduit on both sides of the space, four rows of fluorescent light fixtures, evaporative cooling, heating facilities and the space which Mr. Broman showed me the space they last occupied which they vacated was extremely well lighted, having window walls on the south and east side.

Q. Now this space was on the second floor, was it not? A. Yes, sir.

Q. And is that the Tucson Airport, is that correct? A. Yes, sir. [96]

Q. And that is what distance from Tucson?

A. Approximately seven miles.

Q. Now, so far as office space, isn't it true, Mr. Klafter, that would have very limited use for office space seven miles from Tucson?

A. Except in connection with some manufacturing.

(Testimony of Mark H. Klafter.)

Q. It would have to be in connection with that, would it not, to be office space as such?

A. Unless the Airport Authority was successful in getting somebody to come here. If they could make this headquarters for American Airlines, something like that.

Q. In other words, if you were going to build an office space for clients, you wouldn't build it seven miles from Tucson and put it on the second story, would you, Mr. Klafter?

A. No, sir.

Q. So as office space it wasn't really very exceptionally located, was it?

A. Not as far as location goes.

Q. So far as manufacturing is concerned, of course that is better on the second floor than it is on the ground floor, is it not?

A. For some particular purposes it is.

Q. Yes. Such as?

A. Well, the operation operated by the plaintiff. It was more desirous for them to have wood floors than cement floors. [97]

Q. You can put wood floors on the ground floor, can't you?

A. It didn't happen to be available. In other words, if you offered him the same space on the ground floor he wouldn't take it. He wanted some space where he could get wood floors.

Q. But he could get it in other locations with wood floors. There are wood floors available, aren't there, in warehouses?

A. There are a few of them available.

(Testimony of Mark H. Klafter.)

Q. The fact that it was on the second floor that didn't enhance its value at all?

A. That is merely its location.

Q. What?

A. That didn't add anything to it.

Q. You say it didn't add anything to it. You don't think that detracted anything from comparable space on the ground floor?

A. I wouldn't say so.

Q. In other words, you think ordinary rentals where you have comparable space people would just as soon have the second floor as the ground floor?

A. No.

Q. Won't that enter into the value of something, whether it is more desirable or not?

A. Everything is desirable for a purpose and for his purpose it was more desirable to be upstairs.

Q. But we are talking now in one of your answers about [98] warehouse space. What warehouse space did you compare it with?

A. 19th Street, 16th Street, Factory Avenue, South Park Avenue.

Q. What did you find the average rental value of warehouse space in that area being paid in 1951?

A. From three and a half cents to eight and a half cents.

Q. From three and a half—what building pays eight and a half cents?

A. There are two of them right next to each other, one of them is Schubert Distributing. And

(Testimony of Mark H. Klafter.)

right next to the Schubert Distributing is Western Distributing.

Q. And how long have they been in business there, Mr. Klafter?

A. Well, Schubert Distributing lease was instituted January 1, 1951, and Western Distributing was approximately the same date.

Q. And what facilities do they have?

A. Four walls and a roof.

Q. What as to location, where are they located?

A. On East 16th Street.

Q. East 16th Street, on the railroad?

A. On a railroad spur.

Q. And with docks for—— A. Yes, sir.

Q. ——for trucking? [99] A. Yes, sir.

Q. Now, talking about motor vehicles, so far as trucking is concerned, is that more desirable on the second floor than the ground floor?

A. It didn't make any difference in this particular case. The Airport Authority installed and provided the tenant with an elevator to haul their stuff up and down with.

Q. Isn't it more inconvenient to take material from a second floor from an elevator and out to a truck than it would if on a ground floor?

A. It might be inconvenient.

Q. Why did you decide in the light of what you just testified that this space was worth ten cents per square foot, Mr. Klafter, in 1951?

A. Because I thought it was better than any of the warehouse space I looked at, and I thought it

(Testimony of Mark H. Klafter.)

was not quite as good as a good many of the office spaces which I compared it with.

Q. You wouldn't have paid ten cents a square foot for that as office space in 1951, would you, Mr. Klafter?

A. If I had some sort of industrial operation at the airport, I would.

Q. When you talk about value aren't you talking about what a willing purchaser and a willing renter, a landlord, would take and receive at that time? Don't you? Aren't you taking [100] those into account?

A. I do, but there is a "but" included in it and that is you have to allow for the highest and best use of the property and the highest and best use was the operation of office space in connection with an industrial operation, then I would say yes, I would be willing to pay ten cents a square foot for it.

Q. Doesn't the number of prospective tenants enter into the value of anything?

A. Certainly, the demand.

Q. The demand, yes. And you think there was a great demand for that property at ten cents a foot in 1951, is that what you mean to tell the jury, Mr. Klafter?

A. I think that was the reasonable value of it at that time.

Q. But you don't think there was any great demand for it at that time, do you?

A. There must have been.

(Testimony of Mark H. Klafter.)

Q. Did anybody ever pay ten cents per square foot for any of that property to your knowledge?

A. No.

Q. Do you know whether the owner was asking ten cents a square foot for it or not?

A. I don't know.

Mr. Thompson: That is all. [101]

Redirect Examination

Q. (By Mr. Cutler): In arriving at this valuation you took into consideration all the factors Mr. Thompson has mentioned, didn't you?

A. And some others, yes, sir.

Q. You have given us your best judgment what it was worth then when the plaintiff was vacated?

A. Yes, sir.

Q. Have you testified here voluntarily and without hope of obtaining payment for your time?

A. No, I am being paid.

Q. How much are you being paid?

A. \$75 a day.

Q. That is from the day you first worked on this?

A. That includes preparation and testimony.

Q. How many days have you been working on it? In other words, what is the amount you are going to collect from the plaintiff for your time in going through this?

A. \$350.

Mr. Cutler: That is all.

(Testimony of Mark H. Klafter.)

Recross Examination

Q. (By Mr. Thompson): May I ask one further question. How does it happen you and Mr. Hansen, I believe, came out with exactly the same [102] results, ten cents a square foot? Was that a happenstance or did you collaborate to arrive at that figure?

A. That is not a collaboration. That is my own independent——

Q. You both just arrived at that just by happenstance?

A. No, it isn't happenstance. The figures I accumulated and judgment, after weighing these figures in my judgment.

Q. And he came up and weighed the thing in his figures and both came up to ten cents a square foot? A. Yes, sir.

Q. Did you know how many square feet there were? A. In the lease?

Q. In the loft? A. Yes, sir.

Q. No, how many did you see, how many did you appraise?

A. Mr. Broman yesterday showed us a section which he said was last occupied by the Worcester Felt Pad; I asked him how long it was and he said it was 320 feet. I asked him how wide it was and he said 34 feet. That figures out to 10,880 square feet——

Q. Based on that?

A. 10,880 square feet.

(Testimony of Mark H. Klafter.)

Q. Based on what you were told by someone else, is that right?

A. The assistant manager of the Tucson Airport Authority.

Mr. Thompson: That is all. [103]

Redirect Examination

Q. (By Mr. Cutler): You are not trying to give the jury the impression that you didn't discuss with Mr. Hansen the various information you both had got together, did you? A. No.

Q. You did discuss it, didn't you?

Q. Quite thoroughly and argued about it.

Mr. Cutler: That is all.

Recross Examination

Q. (By Mr. Thompson): Just a moment. You argued about it? Was your opinion originally different from his, Mr. Klafter?

A. No, what I meant by arguing about it, I should say we discussed the matter. In his opinion one lease might have been too low and another lease might have been too high.

Q. You don't mean at first you thought it was only worth seven cents and he convinced you it was worth ten cents, or vice versa? A. No.

Q. It wasn't an argument then?

A. No. We discussed the matter.

Q. You said "argument" a moment ago, but that wasn't true?

A. It was the wrong word. [104]

(Testimony of Mark H. Klafter.)

Mr. Thompson: All right, that is all.

Redirect Examination

Q. (By Mr. Cutler): It is like a friendly argument you have with your wife, is that what you meant? A. I never win those.

Q. Neither do I. Go ahead.

Have I opponent's permission, your Honor, for them to go on about their business?

Mr. Thompson: Surely.

The Court: Very well, you may both be released.
(Last two witnesses excused.)

JULIUS BRAUER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cutler:

Mr. Thompson: At this time we ask the defendant produce their books and records, without which we can't cross examine properly at this time and we want all their books and records. May I ask counsel to produce them now?

Mr. Cutler: I don't know of any rule that requires me [105] to produce them now. I will examine the witness and when it becomes your opportunity you may do so.

Mr. Thompson: Isn't it correct under the rules we are entitled to examine them?

The Court: Is there such a motion? There was

(Testimony of Julius Brauer.)

a motion to produce, permit inspection and copying of certain books.

Mr. Thompson: There was a motion to produce books and records.

Mr. Evans: Not at the trial necessarily.

The Court: I set that motion for hearing on Friday at 9:00 o'clock and nobody appeared.

Mr. Clampitt: May I state to the Court that at a deposition of Mr. Brauer, Mr. Brauer appeared, his deposition was taken and at that time he had the records of the Company there and Mr. Evans questioned him about it and Mr. Brauer, and the deposition will show Mr. Brauer testified from the records there. I knew of nothing further. Mr. Evans made no indication he needed anything further and I didn't appear on Friday.

Mr. Evans: That is correct, he had some records with him at the deposition.

The Court: Very well.

Q. (By Mr. Cutler): Mr. Brauer, you are president of the plaintiff, are you not?

A. Yes, sir.

Q. You were the president of the plaintiff all during the [106] time from the moment the plaintiff located a branch here until the day when you left here, is that right? A. Yes, sir.

Q. I was handed this morning about 10:00 o'clock and saw for the first time, though we have been trying to procure it for some five days, the minutes of an examination of 44 pages which the plaintiff submitted to through you as its president

(Testimony of Julius Brauer.)

by Mr. Evans, one of the counsel for the defendant,
is that right? A. That is correct.

Q. You were examined, as I see from here, December 1, 1953, between the hours of 9:00 o'clock and 5:00 o'clock p.m. at the law offices of Knapp, Boyle, Bilby & Thompson, Valley National Bank Building, Tucson, Arizona?

A. No, I think it was 2:00 o'clock, wasn't it?

Q. It says nine, I don't know.

A. I think it was 2:00 o'clock.

Q. All right, whatever it was. At that examination you produced the books and records you were called upon to produce, is that correct?

A. That is correct.

Q. Now, Mr. Brauer, did you talk with somebody before this lease as to coming and locating the branch here in Tucson? A. I did.

Q. Whom did you speak with? [107]

A. I spoke first, if I remember right, to Dick Drachman.

Q. Who is he?

A. Dick Drachman is a real estate agent in the City of Tucson and an insurance, sells insurance.

Q. Who next did you speak to?

A. He recommended my calling on Mr. Goyette of the Chamber of Commerce and I also talked to Mr. Fred Stofft.

Mr. Thompson: We don't see this has any materiality. We object to it.

The Court: The objection will be sustained.

Mr. Cutler: I haven't said a word yet about

(Testimony of Julius Brauer.)

what was said, I merely wanted to show what he did. I haven't attempted in any way to modify it or change anything, I don't want to.

The Court: The objection has been sustained.

Q. (By Mr. Cutler): Did there come a time in 1951 when you received a certain letter from the defendant that is now in evidence as Plaintiff's Exhibit 5—that is changed to Exhibit 2—dated October 18, 1951, which I show you?

A. Yes, I did.

Q. Now, did you observe that portion of the letter which states—I am reading from the exhibit: “—that the Federal Government requires the use of certain covered space on Tucson Municipal Airport which includes all of the space now occupied by you.”? A. I did. [108]

Q. That statement was made by Mr. Schmidt in his letter? A. That is correct.

Q. Did you believe that? A. Absolutely.

Q. Did you believe the Federal Government was taking over this space of yours? A. I did.

Q. And believing that did you feel you had any right to interfere?

A. I did not have any right.

Q. When was it you first discovered that the Federal Government had not taken over the space, but that the Grand Central had requested the space and had leased it from the defendant?

A. I came to Tucson that year about December, the first week in December, to help move out, complete the moving of our equipment and materials.

(Testimony of Julius Brauer.)

Q. You had gotten a thirty day notice?

A. We got a thirty day notice which meant if we didn't get it out they would keep whatever was left there. So at that time I was under the impression, that is, I understood the Government was taking over the property. And I didn't realize it otherwise until some time later.

Q. About when?

A. I would say perhaps—let's see, three or four weeks possibly. [109]

Q. If I show you a letter of yours dated in January, will that refresh your recollection as to when you first found it out?

A. It definitely would.

Q. I show you a letter of January 15, 1952, and ask you if that will refresh your recollection as to the date?

A. I wrote that letter at about that time.

Q. I am talking now about when you first discovered that Grand Central had taken this over at an increased rental and that the Government, as you said you had understood, had not taken it over.

A. No, it was after this letter.

Q. How much after? Give us the date, that is what I am after.

A. I would say two or three weeks after I wrote this letter I came to them, I got the knowledge it was not the Government that took the property, but it was the Grand Central.

Q. Before you wrote this letter did you talk to anyone on behalf of the defendant?

(Testimony of Julius Brauer.)

A. I did.

Q. Whom?

A. I spoke to both Mr. Schmidt and Mr. Fred Stofft.

Q. Who is he, the latter? We know Mr. Schmidt. Who is Mr. Fred Stofft?

A. Mr. Fred Stofft was a member of the Tucson Airport [110] Authority on the Board.

Q. Meaning one of the directors?

A. I surmise he was.

Q. When you say on the board, what do you mean, the Board of Transportation?

A. No, the Board of Directors of the Tucson Airport Authority.

Q. About when was it you had that talk with Mr. Stofft and Mr. Schmidt?

A. That was during the period we were moving out of the place possibly and prior to my writing this letter of January 15.

Q. State what they said to you in substance and what you said to them in substance.

A. I came to them with the complaint that we were being forced to move and it was costing us a considerable sum of money and were they going to take care of me and Mr. Schmidt, he said, "Yes, he would because we are putting you out of the building." Mr. Stofft said, "Yes, but I don't have the authority on my own to do so. We will have to bring it up before the Board." And I suggested I appear before the Board and state my case, and he in turn suggested that I write a letter so he

(Testimony of Julius Brauer.)

could present that and they would have that to discuss and that no doubt I would get my money.

Q. And as a result of that you wrote the letter of January [111] 1/5? A. That is right.

Q. When you wrote that letter you did not then know that it was not the Federal Government which had taken over but Grand Central?

A. That is right.

Mr. Cutler: I offer the letter in evidence.

Mr. Evans: We object to it, if the Court please, immaterial, irrelevant and incompetent.

The Court: May I see it, please? The objection will be sustained.

Q. (By Mr. Cutler): Now then—I beg your Honor's pardon.

The Court: Sustained.

Mr. Cutler: I heard you. I wanted to give you an opportunity to return the letter.

Q. Was it after you wrote that letter—may that be marked for identification so we know what we are talking about?

The Court: Very well.

(Plaintiff's Exhibit 10 marked for identification.)

Q. (By Mr. Cutler): Now, after you wrote that letter did you then find for the first time that the Federal Government had not taken over but that Grand Central had for a price?

A. That is right.

Q. And did you have any talk with the defendant about that?

(Testimony of Julius Brauer.)

A. I did. I spoke to Mr. Schmidt about that.

Q. What did you say in substance to Mr. Schmidt and what did he say to you?

Mr. Evans: We object to this, if the Court please, on the ground that it is immaterial and irrelevant as to any conversations that took place after the alleged act of eviction occurred.

Mr. Cutler: They make admissions of some sort after an act of eviction or whatever else it is. Certainly he is entitled to say what happened between the defendant and the plaintiff.

The Court: The objection will be overruled.

Q. (By Mr. Cutler): Now then, do you understand the question?

A. I know the question.

Q. Then the Court permits you to answer the question if you understand it.

A. There is an article in the newspapers which stated that the Grand Central Airport rented from the Tucson Airport Authority the space we occupied plus a little extra additional space which was then occupied by the offices of the Howard Hughes, and stated they were getting a rental of thirteen or fourteen hundred dollars per month. I went to Mr. Schmidt and I said, "Is that a fact?"

Mr. Evans: Just a moment. I apparently misunderstood. Who was——

Mr. Cutler: Schmidt is talking to him. [113]

Mr. Evans: Now he said he went to Mr. Schmidt.

Mr. Cutler: No, he told that to Mr. Schmidt.

(Testimony of Julius Brauer.)

The plaintiff's president told Mr. Schmidt what he has just said.

The Witness: Yes, I saw that in the newspapers.

Mr. Evans: We certainly object to that, if the Court please, what he saw in the newspapers.

Q. (By Mr. Cutler): That I consent go out, but what did you say to Mr. Schmidt?

The Court: Just a moment. The jury will disregard the witness' statement what he saw in the newspapers.

Q. What did you say to Mr. Schmidt, that is what is binding on the defendant, not what you read in the newspaper?

A. I said to Mr. Schmidt, "I understand that the Tucson Airport Authority is receiving a rental of \$1300 or more, between thirteen and fourteen hundred, I don't recall the exact amount, for the space I had occupied."

Q. From? A. From the Grand Central.

Q. What did he say in substance?

A. He said, "That is true, excepting they were giving the additional space now being used as offices by the Howard Hughes Company."

Q. What did you say in substance?

A. I also told him, "You got yourself an increase in pay out of this, didn't you?" [114]

Q. What did he say?

A. He admitted he got the \$2,000 salary increase, and that is it.

(Testimony of Julius Brauer.)

Q. What did you say to him? Is that all you said?

A. At that time. I don't remember if I said anything after that.

Q. Did you say anything about the assignment clause in your lease? A. That is right.

Q. If that reminds you without my prodding. I am not allowed to prod. What else, if anything, was said?

A. I pointed out the fact in my lease there was a clause which said our company had the privilege of sub-letting that space, part of it or all of it to any suitable, acceptable people, and I was not given the opportunity, I was never asked, never told. I was told the Government wants the space, get out.

Q. And then after the talk with Mr. Schmidt, did you write another letter in February to the Airport Authority defendant?

A. Then I wrote a second letter in which I told them——

Q. Wait, I don't think the Court permits that and it is not fair. The letter may not get into evidence, in which event you are not allowed to state what is in it. Did you write a letter to the defendant? A. I did. [115]

Mr. Evans: February 7.

Q. (By Mr. Cutler): February 7. Now, did you on February 7 write this letter that was kindly produced by defendant's counsel from its files, to the defendant? A. I did.

(Testimony of Julius Brauer.)

Mr. Cutler: I offer it in evidence.

Mr. Evans: We object to that, if the Court please, upon the ground it is immaterial, irrelevant and incompetent.

The Court: May I see it, please? Mark it for identification first.

Mr. Cutler: Yes, please mark it for identification.

(Plaintiff's Exhibit 11 marked for identification.)

The Court: The objection is sustained.

Mr. Cutler: You see now it is a good thing you didn't say what was in the letter, it did not get into evidence.

Q. (By Mr. Cutler): Now, Mr. Brauer, how much business did your company, plaintiff, do in the first year of operations here?

Mr. Evans: May we ask the witness a question on voir dire?

The Court: Very well.

Q. (By Mr. Evans): Did the Worcester Felt Pad Corporation, Mr. Brauer, keep original books of record showing the business that was done by your company here? A. Definitely. [116]

Mr. Evans: I am going to object, then, if the Court please, on the ground those original books and records are the best evidence.

Mr. Cutler: It seems to me a president of a company knows how much business his company does and has an absolute right to say how much it does even if there are original records, especially

(Testimony of Julius Brauer.)

when he can tell to a penny how much it is and especially when he has been examined on pre-trial and told the same figures he is now going to state. The fact the original records are not here, the original records are not the only evidence. They may be some evidence. He has knowledge. He is president of the company, he has knowledge of its operations.

Mr. Thompson: The further objection, he is tending to refresh his recollection from some document he didn't make himself. It is certainly not an original record.

Mr. Cutler: If he has an accountant's report, a certified public accountant's report in front of him of his own operation to refresh his memory to the penny of the thousands he did I don't feel, at least I submit to the Court the fact he hasn't the original books here prevents him from testifying as to what business he knows the company did, if he knows. I will ask that question preliminary, if your Honor wishes me to. It seems to me that is taking a rule of evidence and torturing it beyond practical use. [117]

The Court: He testified that the company did keep books and records of the business that they did. It seems to me that would be the best evidence.

Mr. Cutler: It is not the only evidence.

The Court: Well, of course, that is always true with the best evidence rule, very frequently true there may be other evidence but the best evidence is the books and records themselves.

(Testimony of Julius Brauer.)

Mr. Cutler: Let me get at it preliminary in another way.

Q. Are you familiar with the operations of your company? A. I am.

Q. Are you also treasurer of the company as well as president? A. Yes, sir.

Q. Did you keep yourself familiar with the operations of your own company in so far as the branch here is concerned? A. I did.

Q. How much did you do the first year?

Mr. Evans: If it please the Court, we are going to make that same objection on the ground the original books and records of this plaintiff company are the best evidence.

The Court: It is the same question. The objection will be sustained.

Mr. Cutler: If your Honor will give me an exception. And that will merely mean we will have to get the books here [118] for that purpose. But I still submit I would like an opportunity, although you might not want to hear me again, maybe you are tired of hearing me altogether——

The Court: No.

Mr. Cutler: All right, thank you.

So if I ask the same question about the second year and third year I assume your Honor's ruling would be the same?

The Court: In the light of the witness' testimony that the company maintained books and records in which its volume of business was re-

(Testimony of Julius Brauer.)

corded my ruling would be as to any year and all years the books are the best evidence.

Q. (By Mr. Cutler): What books and records have you here of the company's operations in Tucson?

A. I have a copy of the complete operation with the names of every concern that we sold to and did business with from the day we came here up until the end of 1952.

Q. And is that in the form of a certified accountant's report? A. Yes, sir.

Q. And is each name set forth of every sale during the entire sale of operations from date of opening to date of closing?

A. We have the name of the customer, his address and the amount of each sale and each year in detail.

Q. Now, does that refresh your recollection as to the names of the customers and the amounts you sold here to each one? [119] A. It does.

Q. Was this accountant's report a record kept in the regular course of business which was rendered to the Board of Directors of the plaintiff corporation?

A. That is right. He heads it that way in the first page of his letter.

Q. What other records have you here?

A. We have a record of the—we have a record showing our losses sustained due to the fact that we had to get out of Tucson in such a short period——

(Testimony of Julius Brauer.)

Mr. Evans: Just a minute, Mr. Brauer. If the Court please, the witness is reading from a document which has never been identified in any way.

Mr. Cutler: Yes, he has, and he is not reading from it. He is specifying some of the things it contains. He hasn't read a word from it yet. I don't intend to get to that yet.

The Court: He can tell what records he has and describe them, whether the journal, the ledger. He can describe just by type of the book. He speaks of them as records. Let him speak of them as journal, ledger, the cash book.

Q. (By Mr. Cutler): What records of any kind relative to the operation of this business in Tucson, the branch of your plaintiff company that is suing, have you here?

A. I have the detailed reports from the certified accountants giving all the information. [120]

Q. What else have you here?

A. I do have with me copies of invoices showing the sales that were made after we were told to get out, at a loss to our company, to show they were different from what our regular prices were at the time.

Q. Now, were these records you have identified prepared regularly in the course of business by your accountants?

A. No, they were not. They were prepared so I could substantiate on my claim to the cost, whatever it was. I was not told to bring any books. I

(Testimony of Julius Brauer.)

brought no records in detail other than the book itself.

Q. Didn't you get monthly reports from your accountants? A. Oh, yes, sure.

Q. Weren't they regularly rendered in the regular course of business? A. That is right.

Q. Isn't this a consolidation of all those monthly reports together as they were kept in the regular course of business? A. That is right.

Mr. Thompson: We object to that as leading and suggestive, improper.

The Court: Sustained.

Mr. Cutler: There happens to be a statute in this state that says you can prove records that way. May I read it to you? [121]

The Court: The objection was the question was leading. The objection was sustained.

Mr. Cutler: Am I allowed to ask him if these records were kept in the regular course of business by these accountants? Anyway, that is the question I ask?

A. They were.

Q. Were the records before you a consolidation of those regular monthly reports kept by the accountants and rendered to the Board of Directors of the progress of the business?

A. Yes, sir.

Mr. Thompson: Just a moment. I object to that again. It is obviously leading, suggesting, improper. By the witness' own testimony this document be-

(Testimony of Julius Brauer.)

fore him was prepared for the purpose of this trial and not the original records of the company.

The Court: Objection sustained.

Mr. Cutler: I do not know of any rule as I read Section 1 of Chapter 62 of the laws of 1951 of the Arizona Code, there is no prohibition to him stating that any of these records kept in the regular course of business, whether original or not, can refresh his recollection as to an amount, that is all.

The Court: If he has got books and records of his company kept in the regular course of business and he establishes that, produces them, they may be offered, but as I [122] understand this thing here he has a certified public accountant who, in the course of its business, makes him a report. We don't even have those monthly reports.

Mr. Cutler: That is correct.

The Court: Now you are wanting this witness or making a statement and asking him if this is a consolidation of those. Well, I think the question is leading, I think those supplementary or regular monthly reports would have to be produced in order that anybody can test whether they are a consolidation or not.

Mr. Cutler: If your Honor please, the difficulty that I have with my understanding of what you say the law is, is this: The fact that a company keeps books doesn't mean they are precluded from proving the business they did from anything except the books. That is one way of proving it; another way of proving is if a president of a com-

(Testimony of Julius Brauer.)

pany is familiar with the business and can refresh his recollection as to the business that was done. And I never heard it said, at least I didn't, that the books are the only source of the president can say he is familiar and knows what the business of the company was. That is the point I am trying in my clumsy way to get over to the Court. I may be wrong, but that is what I think.

The Court: My view of it is this: Where a company, in the established course of its business, keeps records in which are recorded the volume of its business, those records are the [123] best evidence of the volume of business and that is the way of proving it.

Mr. Cutler: And that is the only and exclusive way in which it is proved.

The Court: That is my view of it at the present time.

Mr. Cutler: I will try my best to introduce the evidence the best way I know how, they will object and you will rule on it and we will get rid of it.

Q. (By Mr. Cutler): Are you familiar with the business your company did in Tucson in 1948, 1949, 1950 and 1951?

A. We didn't come here before 1949.

Mr. Evans: Wait a minute. We object to that upon the ground that the records are the best evidence, not what this witness is familiar with.

The Court: The present question is whether he knows, whether he is familiar. I will permit him to answer that "Yes" or "No."

(Testimony of Julius Brauer.)

Q. What is the answer? A. I am.

Q. Now, have you kept in constant touch with the operations of your business in all those years that you have been in Arizona, those three and a half or three years, including the operations in Arizona? A. I have.

Q. And do you know how much business your company did in [124] each of the years, the three years, approximately, that you were here?

A. I do.

Q. Now please state what that was?

Mr. Evans: Now then, we object to that, if the Court please, upon the ground the records are the best evidence.

The Court: Very well. The objection will be sustained.

Mr. Cutler: Very well, you will permit me my exception and I will go into something else.

The Court: It is now 4:30. At this time, Ladies and Gentlemen, we will recess the trial of this case until tomorrow morning at 10:00 o'clock. I will ask you during the recess to bear in mind the admonition heretofore given you.

(Whereupon the trial of the case was recessed at 4:30 o'clock p.m. on December 8, 1953, until the hour of 10:00 o'clock a.m., December 9, 1953.)

JULIUS BRAUER

(Resumes witness stand.)

Mr. Evans: Before we commence further examination of this witness, at this time the defendant

(Testimony of Julius Brauer.)

wishes to file with the clerk a motion to amend its answer, and may the record show a copy of the motion is handed to counsel for the plaintiff. [125]

The Court: I will hear you on this at the recess.

Mr. Cutler: You will hear us both, sir?

The Court: Yes.

Mr. Cutler: If your Honor please, yesterday we were on the subject of profits and business, and so forth, and your Honor ruled that the books were the best evidence and that the president of the company could not testify as to that situation without the books, which were the best evidence. Therefore on that ruling I am withdrawing that portion of our claim which relates to that difference in profits, and I am relying solely upon the difference between the rental value and the lease price for the nine years and seven months during the period still to go on the lease. And for that purpose I would like the defendant to concede the following figures:

The experts' valuation of ten cents a foot is \$1292 per month, that is ten cents per foot, 12,920 feet of space. That comes to \$15,504 per year. That if you make the appropriate reductions for the six years of the lease in which the plaintiff had to pay \$125 a month instead of \$100 a month, and if you extend the \$15,504 out to the nine years and seven months you get a difference between the lease agreed price of \$100 and \$125 per month respectively, and the valuation of the property at the time of the ouster, as testified to thus far by the experts,

(Testimony of Julius Brauer.)

that the difference I am going to ask for as the damages and the only damages the plaintiff claims in this [case] are \$135,280.

The Court: Do you have any further questions?

Mr. Cutler: Oh, yes. Of course I will give him a chance to consult it. I don't ask for any such concession now but that is the way I have computed it.

Q. (By Mr. Cutler): Now, Mr. Brauer, did you rely upon the statements made to you by Mr. Schmidt on behalf of the defendant that the Federal Government was taking over the property and not Grand Central? A. I did.

Q. Had you known that Grand Central was taking over the property at a greatly increased rental, your property, would you have consented thereto?

A. We would not, no.

Q. When you were told that the Federal Government was taking over the property you believed that it was recapturing the property free, did you not? A. That is correct.

Mr. Evans: We object to the leading and suggestive character of the questions.

The Court: It is leading.

Mr. Cutler: Yes. Please forgive me.

Q. What did you believe when you read in Mr. Schmidt's letter that the Federal Government was taking over the property?

A. That the Government was stepping in and taking over the [127] entire property at the airport and according to our lease that meant they

(Testimony of Julius Brauer.)

were taking over the original lease information, which meant they had a right to come and take the place over at no cost to them and we could have no recourse for any expenses we might have had.

Q. You had no knowledge, then, that the Grand Central was paying for your space a rent far in excess of what you were obliged by your lease to pay?

A. Not until I saw it in the newspapers.

Q. That, you told us, was the following February when you wrote the letter that is in evidence?

A. That is right.

Q. But at this time——

The Court: That letter was not admitted in evidence.

Mr. Cutler: You are right. That was a letter marked for identification.

The Court: I believe it is No. 10.

Mr. Cutler: The one I am referring to is 11. What I meant to say, not in evidence. I meant to say at the time you wrote your letter of February 7, which is merely marked for identification as Plaintiff's Exhibit No. 11, is that right?

A. Yes.

Q. So that when you received a letter in October giving you the notice by Mr. Schmidt, which is also in evidence, so that [128] when you received the registered letter of October 18, 1951, from the defendant, signed by Schmidt, giving you thirty days notice to move, at that time you believed his

(Testimony of Julius Brauer.)

statement that the Federal Government had taken it over?

Mr. Thompson: Just a moment. We must object to the leading and suggestive questions.

Q. (By Mr. Cutler): Did you believe this statement? A. Yes.

Mr. Thompson: It is still leading and suggestive, if your Honor please. He can ask him what he believes, I suppose, but to suggest to the witness what he believes is improper.

Mr. Cutler: I don't think it is leading to say "did you believe."

The Court: You can ask him for his belief.

Q. (By Mr. Cutler): Did you believe the statement that the Federal Government was taking over? A. I absolutely did.

Q. Did you rely upon it? A. I did.

Mr. Cutler: You may examine.

Cross Examination

Q. (By Mr. Evans): Mr. Brauer, how long have you been president of Worcester Felt Pad Corporation? [129]

A. Since its inception, close to twenty-five years.

Q. And the company was originally formed in Massachusetts, is that correct? A. Yes, sir.

Q. And you had a plant in or near Worcester, Massachusetts, at all times since the company first commenced doing business? A. We did.

Q. What is the nature of that business or the business done by Worcester Felt Pad Corporation?

(Testimony of Julius Brauer.)

A. We manufacture household items used in the kitchen and laundries of homes, such as, let's see, laundry bags, ironing board pads, ironing board covers, garment bags, shoe bags.

Q. And what was the nature of the operations of the Worcester Felt Pad Corporation at its plant in Tucson? A. The same type work.

Q. Manufacturing those same items?

A. With a few exceptions.

Q. But in substantially the operations here encompassed the manufacture and sale of the same items that were made by the company at its Worcester, Massachusetts plant? A. Correct.

Q. When did you first commence manufacturing and selling those items from the Tucson plant?

Mr. Cutler: I object on the ground that it is immaterial and irrelevant, and at this time not part of the plaintiff's [130] case, cross examination not relevant to the issues that I had brought out. And also upon the ground you have already held none of the conversations and other things were admissible, that the lease spoke for itself, and all the rest that goes with it.

The Court: He may answer. Objection overruled.

Mr. Cutler: Exception, please.

Mr. Evans: Would you read the question, please?

The Witness: I think I know the question. You asked when we started operating.

Mr. Evans: He will ask it, I don't recall.

(Testimony of Julius Brauer.)

(The last question was read as follows:

“Question: When did you first commence manufacturing and selling those items from the Tucson plant?”)

A. That would be about six months, I think, after we signed the lease, around that time.

Q. When did you first take possession of the premises covered by the lease, Mr. Brauer?

A. We took that immediately.

Q. And started setting up your manufacturing equipment?

A. Well, no, because when we first took it over we had one hundred per cent in my own mind I didn't know what I was going to do with it.

Q. Just a moment. Mr. Brauer, you signed the lease March 1, 1949? [131] A. Yes.

Q. And the lease was executed by you as president of the Worcester Felt Pad Corporation?

A. Correct.

Q. At the time that the lease was signed you were, of course, duly authorized by your company to enter into that lease? A. I was.

Q. And at the time the lease was signed the Worcester Felt Pad Corporation intended to take possession of the premises described in that lease?

A. Well, I say yes, we were going to take possession of it.

Q. And you did take possession of it right after the lease was signed? A. Yes.

Q. And continued to retain possession of it until the Worcester Felt Pad Corporation removed

(Testimony of Julius Brauer.)

from the premises some time in December of 1951?

A. Right.

Q. Are you able to tell us the exact day you moved out in 1951?

A. No, because according to the notice we had thirty days, we pleaded for an extension so it would give us a chance to look for some other place, plus the fact we couldn't get out so quick. And I think we got an extension of fifteen days and [132] it must have been by December 15 or 16 we were out of there.

Q. You eventually commenced to manufacture these items for sale at the Tucson operation or at the Tucson plant of Worcester Felt Pad Corporation?

A. Yes.

Q. And all the operations conducted on the premises originally leased by the Worcester Felt Pad Corporation was conducted by the Worcester Felt Pad Corporation?

A. No, wait——

Q. Is that true?

A. Go over that again.

Q. I say the operation, the manufacture and sale of the items manufactured at the Tucson plant was done by Worcester Felt Pad Corporation?

A. No, we had someone else in there.

Q. Tech Toys, Inc.?

A. That is right.

Q. That was an assembly operation of plastic toys?

A. That is right.

Q. At the same time the Worcester Felt Pad Corporation, at the same time in a portion of the

(Testimony of Julius Brauer.)

premises covered by the original lease, was manufacturing and selling these items of household or kitchen, laundry use you have described?

A. Yes.

Q. You continued doing that until the time that the Worcester [133] Felt Pad Corporation removed from the premises there? A. Yes.

Q. As I understand it, you were engaged in business there for a total time of about two and a half years? A. That is about right, yes.

Q. And you say you vacated the premises about the 15th of December, 1951, 15th or 16th?

A. Yes.

Q. Then you were only in the premises a total of about two years and nine months from the time your company first took possession of the property?

A. No, I don't think we started to pay rent until perhaps, oh, two or three months after we signed the lease.

Q. That is right, 1st of June, 1949?

A. That is right.

Q. But you took possession of the property before that, which you had the right to do under the lease? A. Sure.

Q. You started installing equipment that was to be used subsequently in the manufacture of these products?

A. That was about June that you state there.

Q. About the time you started paying rent?

(Testimony of Julius Brauer.)

A. That is right, that is when we started putting our machinery in there.

Q. There was no machinery you say on the premises covered [134] by this lease that was owned or purchased or being purchased by the Worcester Felt Pad Corporation before the 1st of June, 1949?

A. No, I wouldn't say that.

Q. When was it first installed?

A. I can't give you a definite date on that. I would say somewhat prior to that, perhaps a month or so or perhaps less than that.

Q. Now, the lease you signed on behalf of your company was to your way of thinking a very reasonable rent, isn't that true? A. Yes.

Q. And I believe you have considered it as about the lowest rent imaginable for that type space?

A. That is right.

Q. And that is the reason you came out here and entered into that lease, was it not, because it was such a low rent for that type space?

Mr. Cutler: That is unimportant. I beg your pardon. The lease speaks for itself. The fact that he got a low or cheap price is of no importance. And what he had in his mind with reference to that is also of no importance because he is entitled to the benefit of his bargain.

The Court: He may answer.

(The last question was read.) [135]

A. That is right.

Q. And the additional reason you came out here and took that lease was to facilitate the business of

(Testimony of Julius Brauer.)

Worcester Felt Pad Corporation in distributing or selling the items manufactured by Worcester Felt Pad Company in the western part of the United States?

Mr. Cutler: I object upon that his reasons for taking the lease are wholly immaterial, irrelevant and incompetent at this state of the record. That whatever his reasons were the lease speaks for itself and you have prohibited me from mentioning anything that happened prior to the signing of the lease. Even on cross examination his reasons are immaterial.

The Court: I don't agree with your statement I prohibited you from showing anything that happened prior to the lease.

Mr. Cutler: I mean any conversations that happened, or anything that motivated him.

The Court: No. I made rulings on specific objections.

Mr. Cutler: I don't mean to characterize what happened, but my point is that obviously the lease speaks for itself, that his reasons for taking the lease on this state of the record are of no importance. That the man is entitled to the lease provisions which are in writing, and that whatever his reason was is immaterial. A man's motives in a civil case [136] have nothing to do with the question. He is entitled to the benefit of his lease and his reasons are not important or not relevant.

The Court: I am going to permit him to answer it, being cross examination.

(Testimony of Julius Brauer.)

Mr. Cutler: Your Honor will permit me an exception?

The Court: There is no necessity for exceptions, Mr. Cutler. There is an automatic exception to every ruling.

Mr. Cutler: Then I will not trespass on that.

(The last question was read as follows:
“Question: And the additional reason you came out here and took that lease was to facilitate the business of Worcester Felt Pad Corporation in distributing or selling the items manufactured by Worcester Felt Pad Company in the western part of the United States?”)

A. No, not entirely, because I had other reasons in mind.

Q. One of the main reasons why you were favorable in opening up the plant of the Worcester Felt Pad Company in Tucson is that you received favorable or speedy delivery of your items being sold by truck to the distributing points in the west?

Mr. Cutler: I object to the reasons that motivated him in signing the lease.

The Court: He may answer.

Q. (By Mr. Evans): Isn't that true? [137]

A. That was part of the answer after I got started, yes.

Q. That was the biggest item and one of the reasons you were favorable to opening up the plant?

Mr. Cutler: I object to characterizing “biggest,”

(Testimony of Julius Brauer.)

“main,” or other reasons on the ground that isn’t proper cross examination.

The Court: Objection overruled.

Q. Isn’t that true?

A. Let’s word it again.

(The last question was read.)

A. My final decision was afterwards to do that.

Q. In other words, you say that was the biggest item in your decision to open the plant?

A. That was one. I don’t say that was the biggest.

Q. You recall the occasion your deposition was taken on December 1, 1953, in this matter, do you not? A. Yes.

Q. And you recall your giving this answer, Mr. Brauer?

Mr. Cutler: This answer to what?

Q. To this question. Starting on page 36 at line 24—better start up at line 18:

“Question: What I am getting at is to what do you attribute the increase over ’48 when you didn’t have the Tucson plant and ’51 when you hit the high point during the time you were operating the Tucson plant? [138]

“Answer: I got a very good——”

Mr. Cutler: Wait a minute. I don’t think you are allowed to read the answer if the question is objectionable, are you?

Mr. Evans: I don’t really want to ask him about that, if the Court please, but the next question or

(Testimony of Julius Brauer.)

the next answer and the following question doesn't make sense without it.

Mr. Cutler: That doesn't get an incompetent question in if it be ruled by the Court to be incompetent, does it? I believe the proper practice is, if an objectionable question is asked an objection is made before the answer is read. Am I wrong about that? Anyhow, I object to this question upon the ground, first, it is not proper cross examination; second, it is on a subject that has already been withdrawn from the lawsuit, the increased profits, and so forth and so on, and, third, upon a question which your Honor has not allowed him to testify orally, holding that the books were the best evidence.

The Court: I take it this is being asked for the purposes of impeachment?

Mr. Evans: Yes, sir. The particular point is brought out in that portion of the answer commencing on line 3, page 37 of the deposition.

Mr. Cutler: Even impeachment, if it is impeachment of something that is not in the case or that was not ever allowed [139] in the case and when in pre-trial the defendant thought it would be in the case but it is now out of the case and has never been testified to. It cannot be impeaching testimony.

The Court: The question answer may be on regard to some matter not presently in the case, but it may impeach on some material matter, I don't know.

(Testimony of Julius Brauer.)

Mr. Cutler: The best we can do is let it be read.

The Court: And then I will rule on it.

Mr. Cutler: Thank you, sir.

Q. (By Mr. Evans): "Answer: I got a very good answer for you.

"Question: Good.

"Answer: Business conditions today are such that the jobbers and stores do not want to keep big inventories. When they buy from the East it takes it so long to get here that they have to buy in larger quantities. The biggest item and one of the main reasons why I was favorable to opening up the plant here in Tucson was I was shipping out of Tucson with the cooperation of the trucking company. We were getting an order out of Los Angeles which came in, let's say, on a Monday, they had it in their stores by Wednesday. We had two days delivery to San Francisco; we had two days delivery into Texas; we had, I think, three days into the Denver area, Portland, Oregon took longer. It had to have a transfer point in San Francisco, Oakland was the transfer point. The minute we— [140] of course the minute that we stopped we started to lose out again."

Do you recall those questions being asked you and you giving those answers?

A. Yes, I do.

Mr. Cutler: Wait a minute.

The Court: Mr. Witness, your counsel is endeavoring to object and when he makes an objection please don't answer.

(Testimony of Julius Brauer.)

Mr. Cutler: I object to this question and answer upon the ground that it is not impeaching testimony.

The Court: The objection will be sustained.

Mr. Cutler: And I ask your Honor to ask the jury to disregard the reading and answering of that question.

The Court: The jury will, of course, disregard the question and answer just read by counsel, please. The objection is sustained to it on the ground it is not in the case for any purpose.

Q. (By Mr. Evans): Now, it was along in the early part of the year 1949 when Worcester Felt Pad Corporation commenced considering the opening of a western branch plant?

Mr. Cutler: I object on the ground that is wholly immaterial in this lawsuit and the present state of the proceedings.

The Court: I don't see the materiality of it at this stage. Objection sustained. [141]

Q. Now, Mr. Brauer, did the Worcester Felt Pad Corporation, to your knowledge, ever qualify to do business in the State of Arizona?

Mr. Cutler: Objected to as immaterial, irrelevant and incompetent, has nothing to do with the issues, not pleaded, not in the case.

The Court: The record would be the best evidence in any event.

Q. (By Mr. Evans): When did you come out here, Mr. Brauer, after receiving the letter from Mr. Schmidt of October 15, 1951?

(Testimony of Julius Brauer.)

A. I think the second week in December.

Q. The second week in December?

A. That is right.

Q. You arrived here at a time prior to the date upon which the Worcester Felt Pad Corporation vacated the premises at the airport?

A. Final vacating. We were shipping right along.

Q. But before you were actually out of the airport premises completely you had arrived in Tucson? A. Yes.

Q. And during all of the time from the date that the notice was received, the notice from Mr. Schmidt dated October 15, 1951, and the time you arrived here, you had a manager of the Tucson plant here and a person who was in authority for the [142] Worcester Felt Pad Corporation?

A. In its operation only.

Q. That was Mr. Alpert? A. Mr. Alpert.

Q. And after you received the letter of October 18, 1951, from Mr. Schmidt, did you at any time inquire of Lieutenant Colonel Pattillo, or rather of the officer in charge of the Air Force Plant Office, Grand Central Aircraft Company, Glendale Region, Western Air Procurement District, concerning the request of that officer for the space of the airport?

A. I personally? I don't think so.

Q. Did anyone on behalf of the corporation to your knowledge?

(Testimony of Julius Brauer.)

A. Unless I am refreshed it may have been our attorney in Worcester. I wouldn't know offhand.

Q. Did you or to your knowledge anyone, any officer of the Worcester Felt Pad Corporation, at any time between the date that you received Mr. Schmidt's letter of October 18, 1951, and the time you vacated the premises at the airport, contact the chief of the airport division, Civil Aeronautics Administration, Los Angeles, with respect to the actions of the Government in connection with the property there at the airport?

A. Any letters of those sorts would come from our attorneys, I wouldn't know.

Q. You have no knowledge of it? You yourself as president——

A. At that time. Well, at that time, no. [143]

Q. That is what I say, between the date you received the letter and the date you moved from the property?

A. No—wait a minute, let me qualify that perhaps. Those letters, the correspondence, let's say of our attorneys, I think that is what you are referring to, correspondence of attorneys.

Q. My question was did you yourself, Mr. Brauer? A. No, I myself didn't.

Q. Or to your knowledge did any officer of the Worcester Felt Pad Corporation do that?

A. No.

Q. You say when you received the letter from Mr. Schmidt you thought the Government was taking over the entire airport?

(Testimony of Julius Brauer.)

A. That is right.

Q. And do you recall the letter from Mr. Schmidt dated October 18, 1951, which is in evidence in this case as the Plaintiff's Exhibit 2 in evidence, in which you were advised that the Federal Government requires the use of certain covered space on Tucson Municipal Airport?

A. Yes.

Q. You read that, of course?

A. Yes, sure.

Q. But notwithstanding the use of language "certain covered space at the airport," you assumed the Air Force was taking over the entire airport, is that true? [144]

A. Because we had other information besides that letter.

Q. On October 18? A. That is right.

Q. What other information did you have at that time, Mr. Brauer?

A. We received a telephone call from Mr. Alpert.

Q. You say "we," you mean Worcester Felt Pad Corporation?

A. That is right. We received a telephone call from Mr. Alpert here in Tucson, telling us—

Q. Just a moment. I am not going to ask you what he told you unless Mr. Schmidt or someone was on the phone which I assume he wasn't?

A. No.

Q. That was a day or so before you received the

(Testimony of Julius Brauer.)

registered letter, which is in evidence as Plaintiff's Exhibit 2? A. Yes.

Q. I believe you said, Mr. Brauer, on direct examination that it was after you wrote the letter to Tucson Airport Authority, January 15, 1952, that you learned for the first time that Grand Central Aircraft Company was taking over the space that had been occupied by you?

A. No, I don't think I said that. If I did, I didn't mean to put it that way.

Q. It was my understanding, and correct me, sir, if my understanding is wrong, but is my understanding your testimony [145] was to the effect that you wrote two letters to the Tucson Airport Authority, is that correct? A. Yes.

Q. And it was my further understanding that you testified that at the time you wrote the first letter you did not have knowledge that Grand Central was taking over the property.

A. Let's see how that is worded.

Mr. Cutler: Let's find out what the letters are first.

The Witness: I have an idea, Counsellor, if I can get the wording properly in my mind. The first letter was written——

Q. (By Mr. Evans): I believe you testified on January 15? A. You have the letter.

Q. Yes, sir. A. At that time——

Mr. Cutler: Wait a minute. That letter we offered in evidence and on their objection it was refused.

(Testimony of Julius Brauer.)

Mr. Evans: That is correct.

Mr. Cutler: All right. Then I object to any interrogation about the letter which is not in evidence.

The Court: No, he is only fixing a date, as I understand it.

Mr. Evans: That is right, using it as a reference date.

The Witness: Shall I continue?

Q. (By Mr. Evans): Yes, sir.

A. We knew according to the newspapers that the Grand [146] Central was leased the space, but still I thought it was the Government acting.

Q. When did you first know Grand Central was leasing the space?

A. From the newspapers.

Q. When was that?

A. It was prior to that letter.

Q. Prior to which letter?

A. The one you just read to me.

Q. Prior to the letter dated January 15, 1952?

A. That is right.

Q. I think you told us, Mr. Brauer, that from the time you commenced operations of the Worcester Felt Pad Corporation in manufacturing and selling these items that were manufactured by it at the Tucson plant, that you continued doing business in that same manner until your lease was terminated and you moved from the airport premises?

(Testimony of Julius Brauer.)

Mr. Cutler: Wait a minute. May I hear the question, please? I was inattentive, forgive me.

(The last question was read.)

Mr. Cutler: No objection.

A. That is what I said.

Q. (By Mr. Evans): And the Worcester Felt Pad Corporation had begun considering the opening of a western branch plant of your company along in January or so of 1949?

Mr. Cutler: I object upon the ground it is immaterial, not binding on anybody, asking for an operation on the part of the mind of the witness.

The Court: The objection will be sustained.

Mr. Cutler: Pardon?

The Court: The objection will be sustained.

Mr. Cutler: I beg your pardon, I didn't hear you, sir.

Q. (By Mr. Evans): I believe you testified as to a conversation with a Mr. Stofft, Mr. Fred Stofft, Mr. Brauer?

A. Prior to coming, or what?

Q. After you had removed the operations of Worcester Felt Pad Corporation from the Tucson Airport?

A. Yes.

Q. And where did that conversation take place?

A. In his store.

Q. Who was present?

A. No one.

Q. Just the two of you?

A. That is right.

Q. What was that conversation?

A. In effect that——

(Testimony of Julius Brauer.)

Q. No, are you able to relate the conversation as to what you said and what Mr. Stofft said?

A. I can't give it to you word by word, I can give you the gist of it. [148]

Q. Then give us your best recollection of the conversation, what was said by you and what was said by him.

A. That I felt inasmuch as the Government took over the airport and we had quite an expense coming into Tucson and moving out of Tucson, that we should, if it is fair to all concerned, be paid for our expenses. That they, Tucson Airport Authority, was going to receive more money for their space from the Government, that is rather from Grand Central when the Government took over, and under those conditions I expected they would do something for us toward paying us. Mr. Stofft said, "I believe you are right. You are entitled to it in my opinion and give me the detailed figures." I said, "I will appear before your Board and give them my story." And he said it wouldn't be necessary, "If you will give it to me, write it out, give a resume of what you think your costs were I will present it to them." Which I did.

Q. That is about all the conversation?

A. That is right.

Q. Now, I think you said you had a conversation with Mr. Schmidt then later on too?

A. Practically on the same. Mr. Schmidt was of the opinion I ought to be paid for my expenses.

Q. Was there anything in the conversation you

(Testimony of Julius Brauer.)

had with either Mr. Stofft or with Mr. Schmidt about the amount of rental that was being paid by the Grand Central Aircraft [149] Corporation?

Mr. Cutler: I object upon the ground that I attempted to introduce the letter in evidence, they objected. It isn't here; he is now asking for a conversation.

The Court: No, this is a conversation upon which he testified on direct examination.

Mr. Cutler: All right, I beg your pardon.

The Court: Now counsel is asking him something further.

Mr. Cutler: The objection is withdrawn, sir.

The Court: Very well.

The Witness: What was it now? I just said I told it to Mr. Stofft and I also told it to Mr. Schmidt.

Q. (By Mr. Evans): About the amount of rental Grand Central was supposedly paying for the space you had formerly occupied?

A. That is right. It was in the newspapers.

Q. I asked you did you talk to them about that?

A. Yes, that is right.

Q. When did this conversation take place with Mr. Schmidt?

A. Prior to my writing that letter.

Q. Which letter? A. You referred to.

Q. The first letter? A. First letter.

Q. January 15th?

A. That is right. [150]

Q. 1952? A. Yes.

(Testimony of Julius Brauer.)

Q. Where did that conversation take place?

A. At the airport.

Q. In Mr. Schmidt's office? A. Yes.

Q. Was there anyone present besides you and Mr. Schmidt?

A. There was someone in his office. I don't think they were in on the conversation, I don't know.

Q. Can you relate that conversation to the best of your recollection and ability, what you said and what he said?

A. Yes. I said, "I see where the airport is making a good deal on this property. The paper says you are getting \$1300 for the space I occupied and also says you are getting a \$2,000 increase in pay." And he smiled and said, "That is true." But we didn't go any further from that and what I was interested in was getting some money for my expenses.

Q. Did Mr. Schmidt tell you when he had received this increase in pay?

A. I accepted what I saw in the newspapers and he didn't say when.

Q. He didn't tell you when. He didn't tell you he had received it in January of 1951?

A. No, he didn't say. We didn't speak of that.

Q. Do you recall, Mr. Brauer, what newspaper you saw this article in that you are referring to from which you obtained this information?

A. Either the morning or afternoon paper. I would surmise it would be in the morning because the meetings are usually held in the afternoon.

(Testimony of Julius Brauer.)

Mr. Evans: Nothing further.

Mr. Cutler: Nothing further.

ROBERT J. ALPERT

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cutler:

Mr. Cutler: May I proceed, sir?

The Court: Surely.

Q. Mr. Alpert, you are the son-in-law of the previous witness, Mr. Brauer?

A. That is correct.

Q. Were you the person in charge of the plant in October, November and December, 1951?

A. I was.

Q. I mean of course the plaintiff's plant in Tucson here at the airport. Now, did there come a time when you received this letter of October 18 from Schmidt, of the defendant, now [152] in evidence as Plaintiff's Exhibit 2?

A. Yes.

Q. Did you believe the statement in there that the Federal Government had taken over the property?

A. Yes, I did.

Q. I neglected to ask you, when did you first come here with reference to the Worcester Felt Pad plant in Tucson?

A. It was some time in March of 1949.

Q. And are you an officer of the plaintiff?

A. I am not.

(Testimony of Robert J. Alpert.)

Q. And never were? A. Never were.

Q. I believe you are not working for the plaintiff any more and haven't been since the time you left here? A. That is correct.

Q. Now, did you rely upon the representation that the Government had taken over?

A. I did.

Q. And when I said "Government" taken over did you believe anything with reference to whether the Government was paying for it?

Mr. Evans: I believe this is all immaterial in view of the witness' testimony he was not an officer of the company, if the Court please, and object to it on that ground.

The Court: The objection will be sustained.

Mr. Cutler: You may examine.

Cross Examination

Q. (By Mr. Evans): You were on the payroll, Mr. Alpert, of the Worcester Felt Pad Corporation from the time you came here in March of 1949 until you left along in December, 1951?

Mr. Cutler: I object as immaterial, irrelevant and incompetent, having nothing to do with the issues in this case.

The Court: He may answer. A. I was.

Q. Your employment was as manager of the Tucson operation of the Worcester Felt Pad Corporation? A. That is correct.

Mr. Evans: That is all.

Mr. Cutler: That is all.

JAMES L. PATTILLO

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Cutler): Colonel, with apologies for keeping you here since yesterday, perhaps I have arrived at a point where I can get [154] some testimony in I couldn't get in yesterday. I said perhaps.

Did you on behalf of the Army, the Air Force, ask for this airport property or did Grand Central request you to ask for it?

Mr. Evans: We object to that, if the Court please, upon the ground it is immaterial, irrelevant and incompetent. There is a letter of request that is in evidence and it speaks for itself.

The Court: The objection will be sustained.

Mr. Cutler: If your Honor pleases, would you hear me now. If we are going to have that on the next two questions you know what they are. I would like to be heard if I could.

The Court: We might take the morning recess at this time and I can hear you. At this time we will recess for twenty minutes. We will recess until 11:20. I will ask you to bear in mind during the recess the admonition heretofore given you.

(The jury retires from the courtroom.)

Mr. Cutler: Yesterday you were kind enough to indulge me by listening to my discussion about whether Pattillo's testimony could come in first or whether I could make an avowal of what I proved,

then you would have received it. I of course being an officer of the Court, wasn't sure I could make such an avowal and I did not make it. And you then ruled in the absence of some testimony showing the knowledge of Schmidt [155] you would not accept the lack of authority and the other two things, one was lack of authority and the second was the request, and the third was he had nothing to do with civilian work. I then argued that I had the right to introduce the fact first, the fact being, one, that the Army or Air Force did not request it, Grand Central did, and they acted favorably or helped them; two, that this man had no authority; three, this was not an Army directive, and, four, this was not any interference, which he had no right to do, with civilian production.

I then contended that I had the right to prove that fact first, and you disagreed with me, so I had to abide by your ruling. Since then the record has changed. I have established, I believe, at least sufficiently to go to the jury, I think I have established definitely that Schmidt knew this man had no authority, that Schmidt knew that Grand Central had requested and the Army had not requested, and the other items. So that if I understood your ruling I believe the testimony which you ruled yesterday was inadmissible now become admissible. But I want to go a step further. I argued yesterday in my general ignorance of the law that a fraudulent statement is just as fraudulent if made by the defendant, whether it be made with knowledge of its falsity or it be made without knowledge of its

falsity, that a defendant has no right to make a false statement in order to induce [156] another party to do something; and that the falsity of the statement is the immediate concern and not whether or not he knew of it. I cited a case to you, which you say you have read. It seems to me a very simple proposition. If you come in to visit me in my junk yard and there is a heap of slag there, and you say, "What do you want for it, \$100?" And I say, "You can have it." That is a good contract, a valid contract. If, on the other hand, I say to you: You know that pile of slag is sixty-two per cent copper, nineteen per cent lead and various other components to make up the one hundred per cent, and I induce you thereby to pay me that \$100, that is fraud, even though I didn't know what the contents of the slag heap were at the time I made it. But whether or not there was knowledge, I think was unimportant, and I thought so yesterday. But now I believe we have arrived at the point where Pattillo's testimony becomes material, because we have proved from the mouth of the defendant they knew he had no authority.

Now, if your Honor please, one more minute and I thank you for your patience and courtesy to me. So much was talked about from the day we were boys. "The letter speaks for itself." That's a misnomer in our legal work and it is a fiction. A letter speaks for itself where it is between two contracting parties, but it does not become so inviolate where it is letters exchanged between others who are not higher [157] contracting parties. You held

yesterday that the letter of the Government speaks for itself. I respectfully submit to you that such a letter doesn't speak for itself. It was not addressed to my client, it was addressed to the defendant. The defendant not only did that, but he went much further. He made an absolute misrepresentation in writing, as a result of which he led my client to believe that the Government took it over without cost, whereas, he knew in truth and in fact that the Government had not taken over but that Grand Central did take over. And furthermore, he went to the length of concealing from my client the letters of the Government, but merely spoke of a letter of September 26 and concluded and characterized that letter absolutely untruthfully. And that is one of the gravamens of our cause of action. Under those circumstances I respectfully submit I am entitled to go into the factual question: Did Pattillo have the authority; was it a directive; did he have anything to do with civilian work. And that is why I believe we have arrived at a different place than we were yesterday. Therefore we submit this testimony is admissible.

Mr. Evans: If it please the Court, the fact still remains the only basis, proper basis upon which the questions propounded to Lieutenant Colonel Pattillo would be admissible in this matter would be if it could be shown by the plaintiff that Mr. Schmidt or some officer of the Tucson Airport Authority [158] had knowledge of those matters. Now, there is certainly no evidence in the record at this time, the direct question was put to Mr. Schmidt and he

responded to it "No," he did not know, and it seems to me——

Mr. Cutler: He did not know? He said he had no authority.

Mr. Evans: That he did not know whether Grand Central had requested or the Air Force, that he did not know whether Colonel Pattillo had the authority or did not have any authority.

Mr. Cutler: I have his sworn testimony he did know that they didn't.

Mr. Evans: At the time of September 26 or on October 18.

Mr. Cutler: All right.

Mr. Evans: Subsequently, I believe the testimony discloses that he did find out, and in Mr. Schmidt's words, my recollection of it, a considerable period of time after the plaintiff had moved from the premises.

Mr. Cutler: Now may I take another half moment with your indulgence. This is a fraud action. Where an action is based on a misrepresentation any chip or chink of evidence we can show to link the fraud with the truth we are entitled to show. We have already shown a misstatement, a deliberate misstatement in writing, of a letter in writing and a [159] subsequent letter in writing. And we have already shown he knew that the man had no authority. When you have shown that you have opened the door to the fact, did he have the authority, was it a directive, did he have anything to do with civilian production. I believe the testimony is very admissible and I believe the reason it is

fought for, contended so hard against it is they know what this sworn testimony is, that he didn't have the authority, that he had nothing to do with civilians, it was at the request of Grand Central, and I don't know why the jury shouldn't hear that if it be the fact.

The Court: The ruling sustaining the objection will stand.

Now on the motion to amend the answer.

Mr. Cutler: Can I make an offer of proof before I leave that and finish it right now?

The Court: Very well.

Mr. Cutler: Outside the province of the jury. I offer to prove through Colonel Pattillo the following items which have already been sworn to by Colonel Pattillo in another case in the Superior Court by which testimony was taken under oath.

One, that the Grand Central Airport had requested the space, not the Government, and that Pattillo merely complied with the request of the Grand Central in asking for this space involved in this suit. [160]

Two, that Pattillo, Colonel Pattillo, had no authority whatsoever to ask for the space, that that was a matter only outside of his authority, and indeed he didn't know who had the authority to do so anywhere in the Army. It might have been CAA, CAB or something else.

Three, that there was no intention on his part at the time he sent the letter of September 26, 1951, now in evidence that this would be an authority or a directive or a mandate or any instruction that

anyone had to comply with, that it was merely an answer to the request of Grand Central that they wanted the space. And that he had no power to issue a directive, that he did not consider this to be a directive and that he could in any way bind the Army to the extent it was any directive.

Four, he did not receive any instructions or authority—and I am using the exact words of his sworn testimony—other than a consultation with the Grand Central regarding the obtaining of the space at the Air Base.

Five, that Pattillo did not know whether it “is considered Government property or the kind that the courts could have, I don’t know.”

No. 6, that he had no authority to exercise the Government recapture clause, that he did not intend this letter to be in any way so considered, that he knows nothing about arrangements between the Government and the Tucson Airport [161] Authority, and that he sent this letter at the request of Grand Central.

I make that offer to prove it and I am willing to submit the sworn testimony for Colonel Pattillo, who is here, to prove those items. And your Honor has ruled, I believe has ruled you will not permit me to do so.

The Court: Very well. The offer of proof is rejected.

Mr. Cutler: Thank you.

The Court: Now on the motion to amend the answer. Counsel has moved to amend his answer and I believe furnished a copy to plaintiff’s counsel.

Mr. Cutler: We object to the amendment of the answer. We object on the following grounds:

First, until it was first sprung on us yesterday we had no knowledge whatever of any such defense.

Second, that we were not prepared and are not prepared to meet such a defense.

Third, that for some reason or other during pre-trial and all the time that this case took to go to trial there has been no divulging by the defendant of this defense, and,

Fourth, on the ground that the plaintiff has gone to great expense to get appraisers and counsel and a great many other things in here from different places, including my humble self from New York, when perhaps if such a defense had been urged at the proper time and if such a defense were [162] impregnable all that expense might have been saved. I believe to bring it up now at the last moment, during the course of a trial, is improper and not fair.

The Court: The motion will be granted. The answer may be amended in conformity with the portion of the motion which is set out in quotations.

Mr. Cutler: Does that mean you have granted it with no terms?

The Court: That is right.

Mr. Cutler: And you say I don't have to except to that?

The Court: That is true. Every action of the Court is excepted to automatically.

Mr. Cutler: All right.

The Court: Stand at recess until 11:20.

(Recess.)

JAMES L. PATTILLO

recalled as a witness herein, having been previously sworn, testified as follows:

Direct Examination

By Mr. Cutler:

Colonel, you were in daily contact with Grand Central Aircraft, weren't you?

A. Yes, sir. [163]

Q. Did you have an office with Grand Central Aircraft?

Mr. Evans: We object to this line of questioning on the ground it is completely immaterial and irrelevant.

The Court: Objection sustained.

Q. I am speaking of the time now in September, especially September 26, 1951, October and November of the same year, did you have an office with—don't answer it, they want to object—with Grand Central Aircraft?

Mr. Evans: We made the same objection on the ground it is immaterial and irrelevant to any issue in this case.

Mr. Cutler: Would your Honor hear me a moment on that?

The Court: The letter that is in evidence was addressed from Grand Central.

Mr. Cutler: Is that the reason, then? All right.

(Testimony of James L. Pattillo.)

We know that. Why may I not show he had an office there?

The Court: Go ahead, it will probably save time.

Mr. Cutler: Did you rule the second time on this question?

The Court: I am going to permit him to answer it.

Mr. Cutler: Do you know the question?

(The last question was read as follows: "Question: I am speaking of the time now in September, especially September 26, 1951, October and November of the same year, did you have an office with—don't answer it, they want to object—with Grand Central Aircraft?")

A. Yes, I had an office there in the building of the Grand Central Plant.

Q. And you were also in fairly continuous contact with Mr. Schmidt, the manager of the defendant, weren't you?

A. Yes, sir, I met Bob some time soon after I came to Tucson in August, 1951. I don't know how continuous continuous is.

Q. I don't either. But you would meet him from time to time almost every day or so, wouldn't you?

A. No, I might see Bob or might have seen him twice in one day; I might not have seen him again for several weeks or a month.

Q. But you saw him from time to time before you wrote the letter of September 26, 1951?

A. Yes, sir, I think I did.

(Testimony of James L. Pattillo.)

Mr. Cutler: That is all.

Mr. Evans: No questions.

Mr. Cutler: Mr. Alpert for one question and then the plaintiff will rest.

ROBERT J. ALPERT

recalled as a witness, having been previously sworn, testified as follows: [165]

Direct Examination

Q. (By Mr. Cutler): Mr. Alpert, in cross examination you were asked something about whether you came here in March and were on the payroll of the plaintiff in March. When in March did you come here?

A. It was in the latter part of the month.

Q. And that was when you were on the payroll?

A. Yes, at the earliest.

Q. In other words, it might have been later?

A. Yes.

Mr. Cutler: That is all.

Mr. Evans: No questions.

Mr. Cutler: Plaintiff rests.

Mr. Evans: The defendant has a motion to present to the Court at this time.

The Court: Very well. Counsel have indicated the plaintiff has now rested and have indicated they have a law matter to take up with the Court. Due to the hour we will recess until 1:30. I will ask you to be back at 1:30, and during the recess bear in mind the admonition.

(Jury retires from the courtroom.)

Mr. Evans: If it may please the Court, the defendant Tucson Airport Authority at this time moves the Court to instruct the jury to return a verdict in favor of the defendant [166] Tucson Airport Authority upon the grounds and for the reasons that the plaintiff has failed to prove by any competent evidence the material allegations contained in its complaint upon which their claim for relief is predicated. Specifically, that they have failed to prove the material allegations of an actionable case of fraud, and upon the further and specific ground that they have failed to prove the essential elements of a wrongful eviction or wrongful termination of the lease that is involved in this action. The formal part of the motion, and with the Court's permission, I would like to go a little further just in argument on that proposition.

(Argument by counsel.)

The Court: I will reserve ruling on the motion until the conclusion of all the evidence.

(Whereupon a recess was taken at 11:50 o'clock a.m. until 1:30 o'clock p.m. on the same day.)

The Court: You may proceed.

Mr. Evans: At this time, may it please the Court, the defendant offers in evidence a certification of the Secretary of the Arizona Corporation Commission.

The Court: Would you show it to counsel.

Mr. Evans: Yes.

(Defendant's Exhibit D marked for identification.)

Mr. Cutler: If the Court please, would you indulge me [167] for a moment. My associate counsel is getting me the statute on authentication. I don't know what it is here. He said I could have it; I have been waiting for it for the last few minutes. I want to look at it.

The Court: Well, of course, the authentication would be governed by the Federal practice in this court.

Mr. Cutler: Yes, of course. This is a certificate that we, of course, have never seen. It is not part of pre-trial. I pleaded against that before and I am not really pleading that, but I don't understand the certificate, that is all, and I know your Honor has read it. I will object to it on the ground it doesn't seem to me to be a properly authenticated certificate entitling it to admission. In the first place, the man who signs it calls himself Secretary in one place, Acting Secretary in another. I don't know whether the Arizona Corporation Commission has the right to issue such a certificate or if such a certificate is admissible here merely on its face. The language does not seem to me to be very clear. I think the way to prove it is to have the person in charge of these records here to say this, if that be the fact. At any rate, I object to it on the ground it is not a document that is properly authenticated and entitled to admission in this court and does not speak for itself: upon the ground it is not a public record, no authentication of the right of the Commission to so certify, and perhaps the proper proof is somebody [168] in that

office who searched for it and said he couldn't find it.

Mr. Evans: I believe Rule 44-B provides for that statement.

Mr. Cutler: May I look at Rule 44-B, please. Is there some act here that includes Rule 44-B?

The Court: The objection will be overruled. It may be admitted.

DEFENDANT'S EXHIBIT D

State of Arizona—Arizona—Corporation
[Seal] Commission

To all to Whom these Presents shall Come, Greeting:

I, Paul P. Tahy, Acting Secretary of the Arizona Corporation Commission, Do Hereby Certify That I have caused to be searched the records of the said Corporation commission concerning Worcester Felt Pad Corporation, a Massachusetts corporation: I further certify that filings in the incorporating division are filed under the true corporate name, and nothing is found for the name Worcester Felt Pad Corporation, a Massachusetts corporation, having qualified as a foreign corporation, or having been issued a License to do business in this State as a foreign corporation.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the Arizona Cor-

poration Commission, at the Capitol, in the City of Phoenix, this 8th day of December, 1953, A.D.

[Seal] /s/ PAUL P. TAHY,
 Secretary

Mr. Thompson: If it please the Court, we would like to call Mr. Alpert on cross examination under the statute as managing agent at the time this transaction occurred.

ROBERT J. ALPERT

recalled as a witness, having been previously sworn, testified as follows:

Cross Examination

Q. (By Mr. Thompson): You have been sworn, Mr. Alpert? A. Yes.

Mr. Thompson: It is all right to proceed, your Honor?

The Court: Yes.

Q. (By Mr. Thompson): You have been sworn in this case, Mr. Alpert?

A. I believe so. [169]

Q. I believe you testified this morning on direct examination you were an employee of the Worcester Felt Pad Corporation beginning some time in March, 1949, is that correct?

A. That is correct.

Q. Where did you live previous to coming to Tucson? A. Chicago, Illinois.

(Testimony of Robert J. Alpert.)

Q. And what had been your business and experience?

Mr. Cutler: I don't know what this is all about, but I don't know how that becomes material. I don't think I asked my client or any other witness about his business or experience except on expert. I don't know how this becomes material, where he lived or what he did.

The Court: I don't see the materiality of it at present. Is this preliminary?

Mr. Thompson: Yes, just preliminary to finding out what his purpose was in coming to Tucson.

Mr. Cutler: I am not interested—I beg your pardon. I don't think his purpose in coming to Tucson is material to this case. He is not an officer. They have already had some objections sustained on the ground that he is not an officer.

Mr. Thompson: I will withdraw that question to save time.

Q. By Mr. Thompson): Where were you when you were employed by Worcester Felt Pad Corporation? A. I was in Arizona. [170]

Q. Didn't the company pay your way out here?

A. No, they did not.

Q. The Worcester Felt Pad Corporation pay your expenses out here, did they not, Mr. Alpert?

A. No, they did not pay my expenses out here.

Q. No part of them?

A. No part of them.

Q. You had not been employed when you arrived in Arizona? A. No.

(Testimony of Robert J. Alpert.)

Q. You came to Arizona when?

A. Some time in the latter part of March.

Q. And immediately started to work for them, for the Worcester Felt Pad Corporation?

A. Well, it depends upon your definition of work. I was here but there wasn't anything really to work on.

Q. But you were drawing pay, you were in their employ drawing pay?

A. I am not sure if I was drawing pay immediately.

Q. When did you start to draw pay?

A. Frankly, I don't know, sir. I don't recall the exact date.

Q. But some time shortly after your arrival in Arizona you did come to work for the Worcester Felt Pad Corporation, that is correct, is it not?

A. That is correct. [171]

Q. When was the first time you ever went to the Tucson Airport to the leased premises?

A. Oh, I imagine it was after I arrived here, shortly after I arrived here, but I wouldn't know when.

Q. What were your duties, Mr. Alpert, with the Worcester Felt Pad Corporation?

Mr. Cutler: When?

Q. From the time he was employed. Any time, I don't care. Pick a time.

Mr. Cutler: All right, I beg your pardon. Start at the beginning.

(Testimony of Robert J. Alpert.)

A. Well, I think I had no specific duties when I came down here.

Q. But the duties had been discussed before you got here, weren't they?

A. Not in detail, no.

Q. But in general they had?

A. Not very much in general. I had really very little idea——

Q. Mr. Alpert, you knew when you left Chicago that you were going to work for Worcester Felt Pad Corporation?

A. That is correct, as far as going to work for Worcester Felt Pad Corporation, yes.

Q. That is right. And in Arizona?

A. Well, I wouldn't be prepared to go along with that all the way, because there was a possibility I could be working [172] elsewhere.

Q. But you came to Arizona primarily to go to work for Worcester Felt Pad Corporation?

A. That is correct.

Q. And you did go to work for them?

A. That is correct.

Q. And what were your duties when you went to work for them, that is what I want to know.

A. Actually Mr. Brauer was here and I assisted Mr. Brauer in his activities at the time.

Q. Mr. Brauer was here during all of that time, was he? A. During all of what time?

Q. During all the time when you came here until you started out manufacturing? A. Yes.

Q. He was here? A. Well—yes.

(Testimony of Robert J. Alpert.)

Q. He was in Tucson?

A. I am not sure if he was here actually at the time we started manufacturing, but he was here some time after the day I was here. I am a little hazy on the dates.

Q. What were your duties now, tell the jury, what were your duties?

Mr. Cutler: When?

Q. As manager? [173]

Mr. Cutler: When?

Q. At any time when he was here working for them. What were your duties?

A. I was in charge of the local operation of the Worcester Felt Pad Corporation.

Q. Were other people employed by Worcester Felt Pad Corporation than yourself in Arizona in April of 1949?

A. I don't know if they were in April. I don't think so.

Q. When did you begin employing other persons other than yourself and Mr. Brauer for the benefit of Worcester Felt Pad Corporation?

Mr. Cutler: Well, of course, technically he didn't employ Mr. Brauer.

Mr. Thompson: Well, he was employed by the plaintiff here.

Mr. Cutler: That is different.

A. Oh, I don't know, I suppose it was around, oh, possibly June or July, somewhere in there.

Q. You think that was the first people hired was in June or July?

(Testimony of Robert J. Alpert.)

A. To the best of my recollection.

Q. Did you maintain a bank account in Tucson for Worcester Felt Pad, Mr. Alpert?

A. Did I maintain?

Q. Did the company maintain a bank account here in Tucson, [174] Arizona?

A. Yes, the company maintained a bank account.

Q. With what bank?

A. Valley National Bank.

Q. And employees were paid through that account, were they not? A. Yes.

Q. Now, attempt to refresh your recollection and tell me when you first hired anyone to work for Worcester Felt Pad after March, 1949, in Arizona?

A. I have already answered that to the best of my recollection, sir.

Q. And that is your recollection. Now, was machinery ordered installed, to be installed in the plant, was purchased for that purpose?

A. There again I don't know. I came out here cold and I was under the impression the machinery had come from back East.

Q. When did the machinery arrive? When did the first shipment of machinery arrive?

A. I couldn't give you an exact date on that.

Q. To the best of your recollection?

A. To the best of my recollection, it was some time after I got out here.

Q. Well, sometime, that covers a wide field. Was it in the month of April? [175]

(Testimony of Robert J. Alpert.)

A. It could have been. It could have been May. Truthfully I don't remember. It could have been June.

Q. The first work done by Worcester Felt Pad under your supervision as manager was installation of machinery and readying of the plant for production, isn't that correct?

A. Well, yes, they had to set the plant up, that is correct.

Q. And when was it set up and the operations start?

A. Again I think it was probably some time in the period June or July, as I said.

Q. That was when manufacturing started, you think? A. Yes.

Q. How long a time did it take to get the machinery set up and get set for operations?

A. I don't know. It probably took possibly a month. I don't remember offhand. That applies back to the previous question, when the machinery got out here.

Q. I missed the answer. Will you tell me again how long you think it took for you to set up the machinery?

Mr. Cutler: He said about a month he thinks. He doesn't know.

Q. Before I proceed further I am calling your attention—I won't ask you any question about it except to ask you if this refreshes your recollection—Plaintiff's Exhibit 10 for identification, it is

(Testimony of Robert J. Alpert.)

not in evidence, but I want you to examine this document——

Mr. Cutler: I object. Excuse me—— [176]

Mr. Thompson: I am not asking about anything——

Mr. Cutler: I understand what you are doing, before you do it may I make an objection?

Mr. Thompson: All right, object.

Mr. Cutler: I object to showing the witness a paper not in evidence which was kept out of evidence through the strenuous efforts of my friend who is now handing it to the witness. That is improper examination. It hasn't been shown yet he needs to look at the paper. A foundation has not been laid for showing him a paper, and certainly not one not in evidence.

The Court: The objection will be overruled.

Mr. Cutler: All right.

Q. (By Mr. Thompson): Does that refresh your recollection on whether or not your expenses were paid to Tucson by the Worcester Felt Pad Corporation?

A. Well, yes, it throws some more light on it.

Q. Were your expenses paid to Tucson by Worcester Felt Pad?

A. Well, on sort of a contingency basis. I paid them myself coming out here.

Q. But they were repaid to you by Worcester Felt Pad, is that correct?

A. Well, yes, they were.

Q. Now, during the time you were here what

(Testimony of Robert J. Alpert.)

was the business of Worcester Felt Pad in Arizona? I think I am clear on it but I would like to have you tell me. What did you manufacture [177] and sell in that area?

A. Ironing pads and covers, various textile products used in kitchens.

Q. You bought raw material, did you, then manufactured it into that, I presume?

A. That is correct.

Q. You bought any material that went into the final fabrication of this article, the raw materials were purchased by the company and then the employees cut them up, sewed them, did whatever was necessary to make ironing pads and so forth out of them?

A. That is right.

Q. You had how many employees working in this area during this time, what was the maximum that you had?

A. Possibly ten or twelve.

Q. And what hours did they work during the week, your employees?

A. They put in an eight hour day.

Q. You only worked one shift, I presume?

A. That is correct.

Q. In the daytime. What was done with these articles of manufacture when they were produced?

A. They were sold.

Q. Sold. Sold here locally and in the western states, is that right? [178]

A. That is correct.

Q. But you did sell many of them right in and

(Testimony of Robert J. Alpert.)

around Tucson, that is correct, is it not, and Phoenix?

A. Well, what do you mean by "many?"

Q. A substantial part of your business was in Arizona, of the Tucson business was in Arizona?

A. No, I wouldn't say that.

Q. Well, a part of it was here?

A. A part of it was here, not a substantial part.

Q. Now, as I understand it, your work continued from the time or about the time you first came here until some time, was that in January of '51, am I correct in that, when you finally left Tucson, Mr. Alpert?

Mr. Cutter: '52 it is.

A. 1952, that is correct.

Q. December of '52, that is correct?

Mr. Cutler: December of '51.

Q. You were here in this town from March '49 to December '51?

A. No, that is not quite correct. I was here actually until January, I think February of '52.

Q. That was during the time you were packing up and moving? A. That is right.

Q. And you packed up and moved a part of your machinery to other places, is that correct?

A. Yes, that is right. [179]

Q. For the purpose of setting up another branch in California, is that right?

A. No, that is not correct.

Q. Or did you ship it back to Massachusetts?

A. That is right.

(Testimony of Robert J. Alpert.)

Q. Do you know whether or not the company still has any property stored here at Ryan Field?

Mr. Cutler: Objected to as immaterial.

The Court: He may answer.

A. I don't know, sir.

Mr. Thompson: No further questions.

Examination by Mr. Cutler:

Q. You were a Naval Officer for the United States Government? A. Am I now?

Q. You were? A. I was, yes.

Q. What was your office?

A. I was a lieutenant junior grade.

Q. And when you came out here you paid your own expenses, didn't you?

A. When I came out here, that is correct.

Q. How much later did you get your expenses, you said were on a contingent basis, when did you get them back? [180]

A. I wouldn't recall.

Q. Was it some time after you got here?

Mr. Thompson: I object to that as leading and suggestive.

Mr. Cutler: You brought it up.

Mr. Thompson: He said he doesn't know. This is cross examination.

Mr. Cutler: Wait a minute——

Mr. Thompson: I am objecting because it is leading and suggestive and not cross examination.

Mr. Cutler: This is cross examination of what

(Testimony of Robert J. Alpert.)

you brought out, and I believe the rule is I am allowed to lead on cross examination.

The Court: I am going to let him answer. The question was, was it some time after you got here.

A. Yes.

Q. (By Mr. Cutler): And you didn't get here until the last week of March, 1949? A. Yes.

Mr. Cutler: That is all.

JULIUS BRAUER

recalled as a witness, having been previously sworn, testified as follows: [181]

Cross Examination

Q. (By Mr. Thompson): Mr. Brauer, you have been sworn previously and testified in this case?

A. Yes, sir.

Q. And you are and were during all the times mentioned in the plaintiff's complaint president of Worcester Felt Pad Corporation? A. Yes.

Q. And as such you were its chief executive officer? A. Yes, sir.

Q. And it operated originally in Massachusetts?

A. We still do operate there.

Q. And prior to it ever coming to Arizona it operated in Massachusetts? A. Yes, sir.

Q. About some time prior to 1949 or at least prior to March, 1949, the company decided to open a plant in Tucson, didn't it? A. No.

Q. You would say there wasn't any such inten-

(Testimony of Julius Brauer.)

tion on the part of the company prior to March, 1949? A. That is right.

Q. And you did come to Tucson, the company did, in March, 1949, did it not?

A. That was when I signed my lease, wasn't it?

Q. That was when you signed the lease.

Mr. Cutler: I object to the conclusion. The company did come to Tucson. I have no objection to the statement that the company signed a lease on March 1, 1949.

The Court: That was the witness' answer.

Q. At the same time or thereabouts you sent your son-in-law here for the purpose of managing the company's affairs in Tucson, isn't that correct?

A. No.

Q. You say you didn't send him here?

A. No, sir.

Q. He came here at your request, did he not?

A. Yes.

Q. And you paid, the company paid his expenses for coming here, did it not?

A. They did, yes.

Q. And he did immediately become the manager of the Worcester Felt Pad in Arizona, did he not?

Mr. Cutler: I object to the use of the word "immediately." I have no objection to the time being stated when he entered into the employment in Tucson.

The Court: He may answer.

Q. He immediately became manager of the Tucson plant, did he not?

(Testimony of Julius Brauer.)

A. We didn't have a plant until I set up my machinery, but [183] I would say when I got started he was the manager.

Q. And he was representing you and being paid a salary for the actual manufacturing started, was he not, Mr. Brauer?

A. Might be possible.

Q. What?

A. Might be so because he is my son-in-law, you know.

Q. You were at that time and prior to the manufacturing of any material, you were installing machinery there and arranging for help, were you not?

A. We were, I would say, sometime in April or March perhaps, I would say we were. I couldn't say exactly, but around that time.

Q. Do you recall when the first machinery was brought into Tucson by your company?

A. Not the exact date.

Q. Well, within—approximately when was it?

A. I surmise, I say the end of March or early April, and so on. I surmise it was about then.

Q. When were the first employees other than your son-in-law hired by Worcester Felt Pad?

A. At the time when we started to get materials in.

Q. Some time late in March, 1949, is that correct?

A. You are speaking of actual employees doing work?

(Testimony of Julius Brauer.)

Q. Putting in the machinery and so forth, yes.

A. I would think so. [184]

Q. And prior to that time you had been making some investigation about the employment situation for the purpose of hiring employees, did you not?

A. Let's put it I was investigating to see the feasibility of hiring employees for whatever purposes I wanted to use them for.

Q. I call your attention to Defendant's Exhibit 10 for identification, merely ask you is that your signature? A. Yes, sir.

Mr. Cutler: Is this the letter I offered in evidence?

Mr. Thompson: This was the letter that was objected to a few minutes ago.

Mr. Cutler: Is this the letter I offered in evidence, whether it was his signature?

Mr. Thompson: Yes.

Mr. Cutler: I just wanted to know.

Q. (By Mr. Thompson): Does that refresh your recollection?

Mr. Cutler: I object to this course of examination. I understand the rule to be that you must lay a proper foundation. The proper foundation is, if you can't answer the question and you need recollection you may show a witness something to cause him to recollect, but you must first exhaust the witness and see if he can answer your question without refreshing his recollection.

The Court: I will agree with you one hundred

(Testimony of Julius Brauer.)

per cent [185] on direct examination, but this is cross examination.

Mr. Cutler: Then will you let me finish my sentence. Even in cross examination I believe that the procedure is to first find out if the witness can answer without the paper, not given the paper first. However, that is my objection.

The Court: The objection will be overruled.

Mr. Cutler: Especially where the paper is not in evidence and has been objected to by the man offering it now to the witness to refresh his recollection.

Mr. Thompson: I will withdraw the question, then reframe it in another way.

Q. Did you state to the Tucson Airport Authority, rather did your company state under your signature that it made up its mind to come into Tucson more than three years before January 15, 1952. Did you make that statement?

A. There was a reason for my making the statement.

Q. Did you make the statement?

A. Yes, I did.

Q. You said that your company had determined to come into Arizona three years before 1952?

Mr. Cutler: Is this using the contents of a letter not in evidence to which you objected to the admission of? That isn't proper because if it is, that letter then becomes admissible.

The Court: The question has been asked and answered. [186]

(Testimony of Julius Brauer.)

Q. (By Mr. Thompson): I believe, Mr. Brauer, you testified that part of the operation was you manufactured into ironing pads and the like and sold them in this western country, is that right?

A. Yes, sir.

Q. You kept books here in Tucson?

A. Yes.

Q. You had a bank account here in Tucson?

A. Yes.

Q. Your employees were paid out of that bank account?

A. Yes, sir.

Q. And your bills were mailed from Tucson for supplies?

A. That is right.

Q. You billed stuff from the wholesalers or whoever supplied you with raw materials, they sent them to you here in Tucson for fabrication?

A. Yes. They were not paid, those bills, the bills were not paid out of Tucson.

Q. But they were sent here to Tucson.

A. Yes.

Q. And the materials were manufactured in Tucson?

A. Yes.

Q. And they were billed to the customers in Tucson?

A. Yes, sir.

Q. And payments made by the customers to your place in Tucson? [187]

A. No, sir.

Q. No payments ever made?

A. In very rare instances. Payments were to be made to our home plant.

Q. But there were payments made to you here, were there not?

(Testimony of Julius Brauer.)

A. It is possible perhaps local payments were.

Q. That is what I am asking about, local payments?

A. It is possible.

Mr. Thompson: That is all.

Mr. Cutler: May I have that exhibit, please?

Examination by Mr. Cutler:

Mr. Cutler: I now offer in evidence Exhibit 10 upon the ground by reading a paragraph or a sentence from it to the witness he made the whole exhibit admissible.

Mr. Thompson: I certainly object to that, your Honor. First off I merely showed it to the witness to refresh his recollection and he answered the question "Yes" and that is the end of it.

The Court: I don't recall his reading anything out of it. The objection will be sustained.

May I ask counsel when you are through with the exhibits if you will please give them back to the clerk.

Q. (By Mr. Cutler): Something was said to you about a statement that for three years you had been intending to get [188] in here, and you said you made such a statement for reasons, but nobody asked you what the reasons were. Explain that, please.

Mr. Thompson: I object to that on the ground——

The Court: I will let him answer.

A. When I wrote that letter I was in hopes by presenting a good case to the Tucson Airport Authority that they would consider my plea for them

(Testimony of Julius Brauer.)

to pay me the monies I expended in coming into the city and going out of the city. Naturally, under those conditions I put as nice a picture as I could with that expectation. That is the answer. I am not an attorney. I wrote a letter I thought was a nice way of trying to get them to do so.

Q. On March 1, 1949, when you made this lease did you intend then to operate—tell us how you signed the lease?

Mr. Thompson: I object to that on the ground the lease speaks for itself. It was made by a corporation.

Mr. Cutler: This is slightly different from what you were trying to bring out when you brought out the statement from this witness about the three years. He is entitled to explain it.

The Court: You have a double question there.

Mr. Cutler: I will try to cut them down into separate questions.

The Court: Reframe it, please. [189]

Q. Withdraw the question. When you came here on March 1 and signed the lease in evidence did you intend then to operate here?

Mr. Thompson: Just a moment. I object to that question. It seems to me that is highly immaterial. First off it is leading, suggestive and it is absolutely improper because the lease shows who signed it and it wasn't signed by this witness personally, signed by a corporation. It is self-serving.

(Testimony of Julius Brauer.)

Mr. Cutler: What has that to do with the question you are trying to put to the Court?

The Court: When you say "you" you mean the Worcester Felt Pad Corporation?

Mr. Cutler: Yes, sir.

The Court: He may answer.

(The last question was read as follows:

"Question: When you came here on March 1 and signed the lease in evidence did you intend then to operate here?")

A. When you asked me if I came here March 1, I was here prior to March 1.

Q. I am talking about March 1. Did you know then you were going to operate a factory here or not? A. Not one hundred per cent, no.

Mr. Cutler: You may examine. [190]

Recross Examination

Q. (By Mr. Thompson): You were here prior to March 1, you say?

A. I was here, I think either November or December. I have been coming here to Tucson for the past eight years about the same time for the winter months.

Q. Who did you first say you contacted about coming here for property for your factory?

A. I think the first one I saw was Dick Drachman.

Q. And you told him you wanted a location for your corporation's factory, did you not?

A. No. I told him the stories around town that

(Testimony of Julius Brauer.)

the Tucson Airport Authority has some space to rent at a very low figure and I would be interested in looking at it.

Q. Didn't you tell the people in the Tucson Airport Authority that that's what you intended to do with that property?

A. Before they would consider at that time renting space to anyone else or anyone, let's say, a manufacturing concern, they wanted to know what you had in mind to do with it. And I was told the City didn't have sufficient power to handle big concerns, therefore I told them what I had in mind was something with light manufacturing equipment.

Q. Didn't you tell your counsel in this case that the reason you got such a low rent was because you represented to the Tucson Airport Authority you were going to run a factory here [191] and employ people? Didn't you tell your own counsel that, Mr. Brauer?

A. I don't gather that——

Q. Didn't you tell him that in substance? You heard his opening statement to the jury yesterday, didn't you?

A. Yes. If you asked me to repeat it I wouldn't know.

Q. Didn't you tell him that? Wasn't that made with your authority, didn't he get that information from you?

Mr. Cutler: I thought we understood lawyers' openings and lawyers' closing, both of us agreed,

(Testimony of Julius Brauer.)

didn't amount to anything, it was the evidence that counted.

Mr. Thompson: It is cross examination. I am merely asking him if he told his counsel that.

Mr. Cutler: He says he didn't. He says he didn't know what I said.

Q. (By Mr. Thompson): You never told your counsel that when you came here you represented to the Tucson Airport Authority that you were going to operate the Worcester Felt Pad Corporation manufacturing plant or branch of it in Tucson?

A. Let's say this way. I had in mind at the time that this was a terrific deal for me to take over in that I had a business, Tech Toys——

Q. Now, Mr. Brauer,——

Mr. Cutler: May he answer?

The Court: He asked you if you told him thus and so. [192]

Q. (By Mr. Thompson): You can say "Yes" or "No." Did you tell them that, that you were going to open a factory for Worcester Felt Pad at that plant?

A. I would say no, not from the start.

Q. Isn't that the reason you say they gave you the low rental because you made that representation to them?

A. That I was going to do what?

Q. You got the low rental because you were going to operate a factory there, employing people?

A. That may be so.

Mr. Thompson: That is all.

(Testimony of Julius Brauer.)

Re-Examination by Mr. Cutler:

Q. At the time you had got the lease, you were starting to say you had got a good deal, is that what you were going to say? A. Yes.

Q. You then didn't know whether you were going to use it for Tech Toys——

Mr. Thompson: Oh, I object to this leading and suggesting.

Mr. Cutler: Withdrawn.

Q. Did you have another corporation called Tech Toys?

A. It was in the process of being formed.

Q. Where was that at the time, where was the operation? [193] It wasn't operating, was it?

A. No.

Q. You had in mind you would be using——

Mr. Thompson: I object——

Q. Did you have anything in mind with reference to Tech Toys?

A. Yes, sir, I thought I could make an advantageous lease to Tech Toys for the space; that is why I insisted on the clause I had a privilege to sub-let my space to suitable tenants.

Q. You did insist upon the clause in the lease, that is paragraph—I will show it to you to refresh your recollection.

Mr. Thompson: If it please the Court, I don't think that is proper. It is part of the lease. It is there.

(Testimony of Julius Brauer.)

The Court: He may show it to him. The lease hasn't been put in evidence.

Mr. Cutler: I think it would be wiser if I put the lease in evidence. Then I offer in evidence the lease in this case dated March 1, 1949.

Mr. Evans: I am sure we have no objection.

The Court: It may be admitted.

(Plaintiff's Exhibit 1 in evidence.)

[Plaintiff's Exhibit 1, Lease, is set out at pages 13-18 of this printed record.]

Q. (By Mr. Cutler): Was it upon your insistence such a clause be put in the lease?

A. Yes, sir.

Q. Then you then had in mind you might sublease all the [194] premises——

Mr. Thompson: I object to that again. Counsel knows better, if it please the Court, than to continually lead the witness.

The Court: It is leading.

Mr. Thompson: And it is immaterial further.

Q. (By Mr. Cutler): What did you have in mind when you insisted upon the insertion of the clause that any part or all of the premises could be assigned and that the landlord would have to accept them, providing they were satisfactory?

Mr. Thompson: Just a moment, please. This is all improper, immaterial and certainly improper redirect examination, if it please the Court.

(Testimony of Julius Brauer.)

The Court: He may answer.

(The last question was read.)

A. It seems to me the basis of the rental I was getting——

Mr. Thompson: May I, for the record, make the further objection it is self-serving.

Mr. Cutler: Everything the witness says is self-serving to his side of the case. There wouldn't be any testimony otherwise if he is a party.

The Court: I will overrule the objection.

Mr. Cutler: Shall we read it again to you now?

(The last question was read as follows:

“Question: What did you have in mind when you insisted upon the insertion [195] of the clause that any part or all of the premises could be assigned and that the landlord would have to accept them, providing they were satisfactory?”)

A. My thought behind that was here was a lease I was getting at a very low price and it looked to me that there was a good opportunity to sub-let it at an advantageous rate to someone else. At first I had in mind Tech Toys. Then I also considered other factors, possibly people coming into town and wanting space.

Q. And you didn't make up your mind about actually going ahead with the manufacturing operation until much later, did you?

Mr. Evans: Again an extremely leading question.

The Court: It is leading. Don't lead the witness.

(Testimony of Julius Brauer.)

That is a statement, all he has to do is say "Yes" or "No."

Q. (By Mr. Cutler): When did you make up your mind to go ahead with the manufacturing operation yourself?

A. It would be about the end of March, and if I can go into an explanation——

Q. Nobody has stopped you yet. I am waiting but nobody has stopped you.

Mr. Thompson: Then I will stop him.

Mr. Cutler: You didn't disappoint me, Mr. Thompson. You are right on the ball.

Mr. Thompson: I object to this as not responsive to any [196] question.

The Court: Objection sustained.

Q. (By Mr. Cutler): So next time you don't ask.

Just one more question and I will be through, Mr. Brauer. The lease of course now in evidence provided you didn't have to pay rent until three months later, that is June 1, 1949, is that right?

A. Yes, sir.

Q. What did you have in mind when you insisted—withdrawn. Was it you that insisted upon not paying rent for three months later?

Mr. Thompson: Please. I can't protect myself——

The Court: Objection sustained.

Q. What did you have in mind with reference to this clause?

A. During the three month period——

(Testimony of Julius Brauer.)

Mr. Thompson: I object to it on the ground, I believe the first question was highly improper, it was leading, suggestive. Counsel must have done it with a purpose. I have repeatedly objected to it and I object to any answer based on that kind of procedure.

The Court: The objection will be sustained.

Mr. Cutler: You may examine. Talk about purposes, I think you have had some here too. [197]

Recross Examination

Q. (By Mr. Thompson): Mr. Brauer, after the lease of March, 1949, you said your company did go into operation, didn't you?

Mr. Cutler: If he said so it isn't deemed necessary to be repeated again.

Mr. Thompson: This is preliminary, if it please the Court.

The Court: He may answer.

A. Yes, sir.

Q. Some time after you began operation this lease was modified, was it not?

A. What do you mean?

Q. By changing the space that you were entitled to occupy under it?

A. I don't call that modifying it.

Q. You were moved to and occupied other space?

A. That was part of my lease.

Q. But you were moved and taken to other space which you accepted? A. Yes.

(Testimony of Julius Brauer.)

Q. At that time you were engaged in manufacturing? A. Yes, sir.

Q. Would it be correct that some time in March, 1949, Worcester Felt Pad opened a bank account here in the Valley [198] National Bank in Tucson?

A. I surmise so.

Mr. Thompson: That is all.

Mr. Cutler: That is all, Mr. Brauer.

ROBERT SCHMIDT

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Evans): You were previously sworn? A. Yes, sir.

Q. You identified yourself as manager of the Tucson Airport Authority? A. Yes, sir.

Q. Mr. Schmidt, when is the first occasion you recall meeting Mr. Julius Brauer, president of the Worcester Felt Pad Corporation?

A. It would have been some time in the fore part of 1949, January or February.

Q. And at the time you met Mr. Brauer did you have any discussion with him in connection with the entering into a lease between the Tucson Airport Authority and the Worcester Felt Pad Corporation? A. Yes.

Q. Do you recall where that conversation took place? [199] A. At the airport.

Q. Do you recall who was present besides Mr. Brauer and yourself?

(Testimony of Robert Schmidt.)

A. I do not recall that anyone else was present, no.

Q. Was there anything in that conversation, Mr. Schmidt, by Mr. Brauer concerning the purpose for which he desired to use the premises that might be leased by him?

Mr. Cutler: I object upon the ground that, first, the lease speaks for itself; second, your Honor has prevented us from giving any conversations prior to the lease on the ground that the lease incorporated and merged those conversations; third, that it is a leading question, asking him about one particular thing; fourth, it would contradict the lease because the purposes set forth are set forth in the lease and any conversation between them would not be binding; fifth, it is irrelevant, incompetent and immaterial.

The Court: The objection will be overruled. Answer that "Yes" or "No."

(The last question was read.)

A. Yes.

Q. What was that?

Mr. Cutler: I object upon the grounds stated, and upon the ground that a lease speaks for itself and states the purpose and anything other than that would be contradictory and if it were, would not be admissible, and it is irrelevant, [200] incompetent and immaterial, and that the lease speaks for itself, as my opponent has so ably urged when I tried the same thing.

(Testimony of Robert Schmidt.)

The Court: The objection will be overruled. Mr. Cutler, please limit yourself to making an objection in the regular way.

Mr. Cutler: All right. In other words, without argument.

The Court: Without any reference to objections made by the other counsel.

Mr. Cutler: All right, I shall try to follow your ruling.

(The last two questions were read as follows:

“Question: Was there anything in that conversation, Mr. Schmidt, by Mr. Brauer concerning the purpose for which he desired to use the premises that might be leased by him? Answer: Yes. Question: What was that?”)

A. Yes, there was a discussion of general type and kind of operation that might be conducted by the plaintiff.

Q. Did he say what type operation that was to be?

Mr. Cutler: Same objection.

The Court: Same ruling.

A. I discussed the parent organization at Worcester and some mention was made of the possibility of a like industry; I do not recall there was anything specific at that time as to whether it might or might not be the other corporation [201] which was mentioned momentarily, Tech Toy.

Q. Mr. Schmidt, after the Worcester Felt Pad Corporation actually took over the premises that was described in the original lease between the

(Testimony of Robert Schmidt.)

plaintiff and the Tucson Airport Authority, can you tell us what space was actually occupied by Worcester Felt Pad Corporation?

A. Yes. In the original occupancy of space they took second story, what we refer to as loft space, on the west side of hangar 2 at the north end thereof, if I recall correctly, between columns 1 and 20.

Q. Was that space that was originally occupied by the Worcester Felt Pad Corporation, what has been mentioned as covered space or uncovered space?

Mr. Cutler: I object on the ground it doesn't seem to me to make the slightest difference what was originally occupied. The question is what were we deprived of in November and December, 1951, if I understand the case. And what difference does it make what it originally was so long as by mutual consent the man was moved to the space he occupied.

The Court: What is the materiality of it, Mr. Evans?

Mr. Evans: To show the reason for the rental being as low as it was and the exception to the original lease, if it please the Court.

Mr. Cutler: If your Honor please, I don't think——

The Court: I don't think that is material. [202]

Mr. Cutler: Thank you.

Q. (By Mr. Evans): Mr. Schmidt, approximately how long did the Worcester Felt Pad Cor-

(Testimony of Robert Schmidt.)

poration remain in the space that was originally assigned to it?

Mr. Cutler: Same objection.

The Court: He may answer that.

A. I would say until about June of 1950, about some place between twelve and fifteen months.

Q. And they were moved at that time to another location at the airport? A. Yes, sir.

Q. And did they remain at this new location then until they finally moved from the airport completely or was there again another move upon the airport itself?

A. There was another move, yes, sir.

Q. And when was that last move made?

A. That move was made in, I would say, March or April of 1951.

Q. And where was the space that was last occupied by Worcester Felt Pad Corporation?

A. Well, the last space was in the south end of the east lean-to of hangar 1, south of what is properly or commonly known as the Airline Terminal area.

Q. How much area was there in the space that was occupied by Worcester Felt Pad Corporation at the termination of its [203] lease?

Mr. Cutler: I object to the word "termination of its lease." I don't know what that means. The lease didn't terminate for nine years and seven months thereafter. If he means at the time we went out, I have no objection.

Q. (By Mr. Evans): I will withdraw the ques-

(Testimony of Robert Schmidt.)

tion and ask it again. In November, 1951, how much space at the airport was Worcester Felt Pad Corporation occupying?

A. I will have to qualify that slightly for this reason——

Mr. Cutler: Wait a minute. Will you please answer the question and then qualify it afterwards? I believe if you can you should answer the question, I submit to the Court.

The Court: Can you answer how much space they were occupying in November?

A. The Felt Pad Corporation proper was occupying about 7500 or 8000 square feet, approximately.

Mr. Cutler: What does the word "proper" mean?

Mr. Evans: Approximately.

Mr. Cutler: No, I thought he said "proper."

The Witness: No, approximately.

The Court: Didn't you say the Felt Pad Corporation proper?

The Witness: That is right. You are correct.

Mr. Cutler: What did you mean——

Mr. Evans: Let me finish then you will have a chance to [204] cross examine.

Mr. Cutler: No, not you finish. Wait a minute. He is asked to state how much space, not proper or improper or main or subsidiary. He is asked to state how much space. That is the answer to the question. He can't divide it up by saying part of

(Testimony of Robert Schmidt.)

it was proper and leaving out another part, if there were another part, I don't know.

The Court: If counsel doesn't clear it up I will permit you to do so.

Mr. Cutler: All right, that is good enough for me.

Q. (By Mr. Evans): What do you mean by 7500 or 8000 feet property?

Mr. Cutler: Proper.

Q. Proper?

A. Because on the first floor of the east lean-to of hangar 1, temporarily, by mutual agreement, some space was occupied with the Tech Toy line stock which was being closed out. Those stocks, the plastic pieces for the toys were stored in large barrels and were kept on the first floor. Now so that there is no misunderstanding, there never was any formal segregation or assignment or subleasing, whatever you might call it, to Tech Toy Corporation proper. But part of the plaintiff's space was, during the major portion of its tenancy with us, occupied by stocks of the Tech Toy Corporation, which was of course common knowledge to us, we knew that. [205]

Q. In other words, they had 7500 or 8000 feet of loft space?

A. That was actually being used for the operation of the Worcester Felt Pad operation itself, yes.

Q. Then there was other space on the first floor which was occupied by——

A. Temporarily, yes.

(Testimony of Robert Schmidt.)

Q. —Tech Toy stock. What do you mean by “temporarily,” what was the understanding or agreement between the Airport Authority and Worcester Felt Pad Company with respect to the occupancy of that first floor space by Tech Toy?

A. It added up to this: They had made a determination of their own, as I understand it, to close out the Tech Toy line and dispose of the surplus sets and parts for sets, and in so doing—I must explain this way, we were in transition, everything was being moved on the airport and there wasn’t on the second floor sufficient space for them to put everything. So some of that went on the first floor until it was closed up.

Q. What was the understanding or agreement between Tucson Airport Authority and Worcester Felt Pad Corporation, if there was any agreement, as to what would happen to the first floor space after Tech Toys had removed all its stock?

A. Well, to the best of my recollection the actual and final allocation of space as a result of the second move was never completely adjudicated. I would put it this way, there [206] was no disagreement amongst us, it was simply a question they had to have so much space to take care of so much material and operation, and at that particular time their actual space requirements after the Tech Toy line had been removed from the premises was less than it would have been had they kept it; and by no means do I wish to imply they were not entitled to the full amount we originally discussed.

(Testimony of Robert Schmidt.)

It was simply a question, let us say, of amicable relationship during the second move. That was a problem for both of us.

Q. During the time you have been manager of the Tucson Airport Authority has there been established rental basis for the occupancy or renting of space at the Tucson Airport Authority property?

A. Yes.

Q. And in November, 1951, say the 1st of December, 1951, what was the established rental charged by the Tucson Airport Authority for the type of space occupied by Worcester Felt Pad Corporation on the second floor on the east side of the building commonly known as the Airlines Terminal?

Mr. Cutler: I object upon the ground, first, that the word "established rate" doesn't mean anything; second, that he is not qualified as an expert in the usual way; third, that if he means by "established rate" the rate that they charged, it would be inadmissible, and, fourth, on the ground it is irrelevant, immaterial and improper.

The Court: He may answer. [207]

A. The question was the established rate, second floor, east lean-to, south end?

Q. Of the space occupied by Worcester Felt Pad?

A. That was four cents a square foot.

Q. Did you have any space at the Tucson Municipal Airport in December of 1951 that was renting for ten cents a square foot?

(Testimony of Robert Schmidt.)

Mr. Cutler: I object on the ground it is immaterial, irrelevant and improper.

The Court: He may answer.

A. Yes, we had space at that time that rented up as high as \$1.50 a square foot.

Q. Where was that?

A. That is in the terminal area proper where the optimum in facilities is furnished, complete with janitor service, higher type of ventilating and heating.

Q. What was the highest rental that the Tucson Airport Authority was receiving in December, 1951, for space of the same type as that occupied by Worcester Felt Pad Corporation, on the 1st of December, 1951?

Mr. Cutler: I object on the ground it is immaterial, incompetent and irrelevant, improper, asks for a conclusion out of the mind of the witness, asking him to compare the space in his own mind. He is not qualified. It is immaterial, irrelevant and incompetent. [208]

The Court: He may answer.

A. The same type of space on the first floor of the same lean-to, published rate, six cents.

Q. What was the rental that was charged the Grand Central Aircraft Company by Tucson Airport Authority for the space that it took over that had formerly been occupied by Worcester Felt Pad Corporation?

A. Four cents.

Q. Four cents a square foot. Incidentally, I understand from Mr. Brauer you received a salary

(Testimony of Robert Schmidt.)

increase as a result of terminating or trying to terminate this lease between the Airport Authority and Worcester Felt Pad Corporation, is that true?

A. No, that is not true.

Q. Did you receive a raise in salary during the year 1951? A. Yes, sir, effective January 1.

Q. January 1, 1951? A. Yes, right.

Mr. Evans: I believe that is all.

Cross Examination

Q. (By Mr. Cutler): While you spent a lot of time in telling us about the 7500 or 8000 square feet of what you call space proper, you spent a lot of time describing some other space, but you never [209] told us somehow how much space there was. How much? A. We had lots of it.

Q. Lots of it? What does that mean, 100,000 square feet.

A. Approximately 800,000 square feet of it, yes.

Q. You mean to say that the Worcester Felt Pad, in addition to what you call the space proper they occupied, occupied another 100,000 square feet? A. No. You didn't ask me that.

Q. I did ask you that. However, how much more did they occupy on the first floor of the east lean-to when they occupied 7500 or 8000 square feet proper on the second floor?

A. After they closed out the Tech Toy line they had no additional space.

Q. Before they closed out the Tech Toy line?

A. Approximately 10,800 or 11,000 square feet.

(Testimony of Robert Schmidt.)

Q. Now, when you spoke of rates and square footages at ten cents and four cents and six cents, and all the others, you meant rate per square foot per month, did you not? A. Yes.

Q. And, for instance, ten cents per square foot per month of the space of 12,920 feet that you leased would be \$1292 per month, wouldn't it, at ten cents? A. Presumably.

Q. Can't you figure it? A. No. [210]

Q. An airport manager couldn't figure that?

A. I have to have a calculator to do that.

Q. And the four cents that you said you rented it for to the Grand Central, that is just six times the rate you rented it for to this plaintiff, isn't it?

A. On the basis of the same square footage, yes.

Q. And the six cents on the first floor that you were getting per square foot per month would amount to eight and a half times the rent you were getting up to then from the plaintiff, wouldn't it?

A. Yes, sir.

Q. Now, isn't it true that there was a discussion about the fact that the electric power lines at the airport were fairly well overloaded?

A. At what time?

Q. I am speaking now of the few weeks prior to the execution by your company, Airport Authority, defendant, to the plaintiff, isn't it true there was a discussion with you in which you said that the electric lines were considerably overloaded or near peak load or above peak load? A. No.

Q. Wasn't it true that you said to Brauer that

(Testimony of Robert Schmidt.)

you wanted to make sure that the electricity used would be very light?

A. That was because of internal conditions within the building proper, not power to the airport itself. [211]

Q. Did that have something to do with not overloading your electric current used?

A. In the area initially occupied by them?

Q. Yes, sir. A. Yes, sir, it did.

Q. Now, before I forget it, in the two moves that were made by Brauer, was it Brauer who requested he be moved around? A. No, sir.

Q. You did that for your convenience, for the defendant's convenience, didn't you?

A. Yes.

Q. And Brauer nicely acquiesced, did he not?

A. Yes.

Q. Am I right in my assumption that each time you moved Brauer it was for the sake of giving his space to Grand Central?

A. That is correct, yes, sir.

Q. And you knew, of course, that the lease had a clause by which Brauer could assign to any satisfactory tenant, didn't you? A. Yes.

Q. And, of course, having been a landlord for considerable space with Grand Central, Grand Central was a satisfactory tenant at that time, wasn't it? A. Yes.

Q. Did you tell Brauer that under his lease he was entitled [212] to assign or sub-let to Grand

(Testimony of Robert Schmidt.)

Central and make the increased rate that Grand Central was paying for himself?

A. I didn't feel it was necessary.

Q. I didn't ask you whether you thought it was necessary. I asked you whether you told him?

A. No.

Q. So you knew that when you were getting six times Brauer's rent for Brauer's space that you were making that additional money which your lease required you to give to Brauer, didn't you?

A. We didn't make any money on the transaction.

Q. I didn't ask you that, and if you want me to I will have the question read again for you. Please, Mr. Stenographer, with the Court's permission, would you read him the question?

(The last question was read as follows:

"Question: So you knew that when you were getting six times Brauer's rent for Brauer's space that you were making that additional money which your lease required you to give to Brauer, didn't you?")

The Court: He answered he didn't make any money.

Mr. Cutler: That isn't what I asked him.

The Court: You did. You asked: When you were receiving this you were making money——

Mr. Cutler: I didn't ask him if he was making money at all. May I have the question re-read, please. I didn't say a word about his making money. [213]

(Testimony of Robert Schmidt.)

The Court: Didn't you say "you were making that additional money?"

Mr. Cutler: If I did, I was mistaken. I mean he was taking money that belonged to Brauer.

The Court: That isn't what you asked him.

Mr. Cutler: Well, forgive me. Under the assignment clause if a tenant was satisfactory, and Grand Grand Central you said was satisfactory, Brauer had a right to the advantage of sub-letting or assigning his lease to Grand Central, didn't he?

Mr. Evans: We object to that, if the Court please. The lease speaks for itself——

Mr. Cutler: This is cross examination.

Mr. Evans: He is asking the witness for a conclusion as to the legal effect of the lease.

The Court: It has been asked and answered before.

Q. (By Mr. Cutler): You knew that under the lease you were getting from Brauer \$100 a month, didn't you? A. Right.

Q. And you knew that under the lease you were getting from Grand Central six times that much, didn't you? A. No.

Q. Didn't you tell the Court and the jury that you were renting this property to Grand Central that Brauer occupied for four cents per square foot per month? [214]

A. That arrangement——

Q. Is that what you told the Court and jury? Did you?

(Testimony of Robert Schmidt.)

A. I can't answer the question without qualifying it.

Q. You can't answer what you told the Court and jury within the half hour, can't you answer that?

A. Not without qualifying it.

Q. You mean you have no recollection?

A. I can't answer the question without qualifying it.

Q. Can you answer the question as to whether you have any recollection what you said on the stand within a half hour? You are not on the stand a half an hour. Can you answer that question?

A. Yes.

Q. And your answer to the question whether you have any recollection to what you said is you do recollect?

A. Yes.

Q. Do you recollect, then, telling the Court and jury that you rented the space occupied by Brauer to Grand Central for four cents a square foot per month? "Yes" or "No."

A. After the Brauer lease was cancelled.

Q. Answer "Yes" or "No," please.

A. Yes.

Q. And wasn't four cents a square foot approximately six times the \$100 a month that Brauer was to pay you for the same space under the lease for the next nine years and seven months [215] except for the increase of \$25 a month or \$300 a year for the last six years of the nine years and seven months to go, isn't that right?

A. Yes.

Q. And you were aware of the fact that the

(Testimony of Robert Schmidt.)

lease signed by you in evidence had an assignment clause in it that we have read to the jury? Were you aware of it? A. Yes, certainly.

Q. Now, Mr. Schmidt, you knew Colonel Pattillo? A. Yes.

Q. How long have you known him?

A. I met him some time during the month of September, 1949.

Q. So that you met him before he came to your place?

A. No, I met him on the Tucson Airport.

Q. Is my memory wrong, I thought he had said—I may be entirely mistaken, and I offer that to you—that he had come to the airport in August, 1951?

A. He may have but I wasn't at the airport all the time during the month of August. I was on vacation along in there.

Q. I am not speaking of that. I don't want to be unfair. You are speaking of '49 and my memory, he said he didn't get there until '51.

A. Pardon me, 1951, that is right. That is an error of mine.

Q. So that you first met him in August or September of 1951? A. Yes, sir. [216]

Q. And you mean that at the time the letter of September 26, 1951, now in evidence was written by him you had only known him a few days?

A. At best, yes.

Q. You had never met him before?

(Testimony of Robert Schmidt.)

A. I had not met him prior to his coming to Tucson and the airport. I knew his predecessor.

Q. And who was that?

A. A man by the name of Duckworth.

Q. Was Duckworth a higher officer in rank?

A. No, sir. My understanding of it was that he had the same position held and now held by Colonel Pattillo.

Q. I support the fact that he called you Bob within a few days, the fact out West you are a little more informal than we are in the East?

A. I have been called worse on shorter notice.

Q. I don't think Bob is such a bad name, as a matter of fact, I think it is a better name than mine.

No further questions.

Redirect Examination

Q. (By Mr. Evans): One question I neglected to ask you previously. Do you recall having the conversation with Mr. Brauer along in January, 1952, after the Worcester Felt Pad Corporation had vacated the [217] airport premises?

A. Well, sometime, generally speaking, around the first of the year, yes.

Mr. Cutler: May I have the question, please?

(The last question was read.)

Q. (By Mr. Evans): That took place at your office, did it? A. Yes.

Q. Was there anyone present besides yourself and Mr. Brauer? A. Not that I recall.

(Testimony of Robert Schmidt.)

Q. Will you relate that conversation to the best of your recollection?

A. Mr. Brauer told me that he had been put to considerable expense in connection with the establishing of the operation in Tucson, and with the withdrawal of his company from operation in this trade area with Tucson as a production and shipping point. As I recall it, he asked me what I thought his chances were of securing some reimbursement toward satisfying those costs. And as I recall it, at that time I felt that anyone——

Mr. Cutler: I object to——

The Court: Just the conversation.

A. Well, I expressed myself with feeling, let me put it that way.

Mr. Cutler: That is a legal way.

A. (Continuing) Anyone that believed they had a claim [218] against us were certainly entitled to file such a claim and if such a claim were presented that it would receive due and proper consideration.

Q. Was there any discussion with Mr. Brauer on that day about a rental that the Airport Authority was receiving from Grand Central?

A. I don't recall that there was, but there could have been.

Q. Do you recall telling Mr. Brauer at that time that the Airport Authority was receiving \$1300 or \$1400 a month from Grand Central for the space that had previously been occupied by Mr. Brauer's company?

(Testimony of Robert Schmidt.)

A. I couldn't have told him that because that wasn't a fact.

Q. Did you have any discussion with Mr. Brauer on that occasion concerning a salary increase you had received?

A. I don't recall having discussed my salary with any of the tenants at any time.

Q. Mr. Schmidt, what in dollars and cents did Tucson Airport Authority receive in rent from Grand Central Aircraft Company for the space that had formerly been occupied by Worcester Felt Pad Corporation?

Mr. Cutler: I object. If the question is what did they receive for 12,920 feet I have no objection; if the question is directed to a smaller amount, I object on the ground it is incompetent, immaterial and irrelevant.

The Court: Is that your question? [219]

Mr. Evans: My question was for the space that the Grand Central took over that had been occupied by Worcester Felt Pad Company at the time it was given notice to vacate the premises.

Mr. Cutler: I would like first to have identified how much that space was.

Mr. Evans: It has been testified they had 7500 or 8000 feet.

Mr. Cutler: I don't think the fact they used the 7500 or 8000 feet of their 12,920 means you can base any damage on that at all. They were entitled to the full use of their 12,920 and if they only used 100 feet of it, if you put them out they are still

(Testimony of Robert Schmidt.)

entitled to the fair rental value of the premises for the amount of space set forth in the lease. That is what I thought, you were directing your question to that point. I respectfully submit to your Honor that the question is 12,920.

The Court: I will let him answer the way it is asked then you can bring it out.

Mr. Cutler: Thank you, sir, for your fairness.

A. For the space occupied on the second floor they paid the rate of four cents, which is, as I recall it—you are speaking of Grand Central, as I recall the question—which would have been about the same area, would have been about two, about \$300 a month.

Q. (By Mr. Evans): And the lease to Grand Central was on a [220] month to month basis?

A. Right.

Mr. Evans: That is all.

Recross Examination

Q. (By Mr. Cutler): Is that the best you are able to say about it, about \$300 a month?

A. I don't recall the exact square footage.

Q. Don't you recall you signed an answer in this case? I want to be sure of that statement before I make it. Let me see the answer, please.

The Court: The answer is signed by counsel.

Q. Did you see this answer before counsel put it in?

Mr. Cutler: Is the answer deemed to be in evi-

(Testimony of Robert Schmidt.)

dence without putting it in? I assume it is. All right, sir.

Q. You saw it? A. Yes, sir.

Q. There you put the amount as precisely 299.50, is that right? A. It says 299.20.

Q. I beg your pardon, that is even more precise, 299.20. Now, 7500 feet times four cents is 300, isn't it? A. That is right.

Q. And 800 is 320? [221] A. Right.

Q. Does that indicate to you it was slightly under 7500 square feet? A. Yes.

Q. But the plaintiff was entitled under its lease to occupy 12,920, was it not? A. Certainly.

Q. It isn't your claim that if the plaintiff only had been using 7500 square feet at one time that he lost the right to use the balance of the property demised to him under his lease, is it? A. No.

Q. Now, when you spoke with him, I believe you said in January, and that would probably be of '52, wouldn't it, Mr. Schmidt? A. Yes.

Q. Didn't you say you thought his claim was justified and he ought to be paid back his expenses? "Yes" or "No." A. No.

Q. And didn't you tell him that one of the other directors, Stofft, had also likewise expressed himself that he ought to be paid his expenses?

A. No.

Q. And wasn't there another director named Levy of the airport defendant who had expressed himself as thinking the [222] plaintiff ought to get back his expenses at least?

(Testimony of Robert Schmidt.)

A. Not to my knowledge.

Q. And you didn't make the definite statement that you were sure the airport was going to give him back at least his expenses?

A. I wouldn't dare make such a statement.

Q. But you didn't make it? A. No.

Mr. Cutler: That is all.

Redirect Examination

Q. (By Mr. Evans): This four cents a square foot Mr. Cutler is asking about to arrive at this \$300 a month or so, how was that figure established by the Airport Authority, Mr. Schmidt?

Mr. Cutler: I don't think that is material to this case. The fact is there.

The Court: Objection sustained.

Q. Who established it, did you establish it yourself?

Mr. Cutler: I think that is immaterial and irrelevant. The fact is it was paid.

The Court: The objection is sustained.

Mr. Evans: No further questions.

Mr. Cutler: That is all.

The Court: At this time, Ladies and Gentlemen, we will [223] take a recess for fifteen minutes. During the recess please bear in mind the admonition heretofore given you.

(Recess.)

The Court: You may proceed.

FRED STOFFT

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Thompson): State your name for the record, please. A. Fred Stofft.

Q. Where do you reside, Mr. Stofft?

A. 2155 East Hampton, Tucson.

Q. Tucson, Arizona. Do you occupy any official position at the Tucson Airport Authority?

A. I am vice president of the Board of Directors, sir.

Q. Were you a member of the Board of Directors in the year 1951 and prior thereto?

A. Yes, sir.

Q. How long have you been a director?

A. Since the Airport Authority was established in 1948, I believe.

Q. And the Airport Authority is the one that has the lease [224] on and operates the Tucson Municipal Airport, is that right?

A. Yes, sir.

Q. And it does engage in the rental of portions of that property? A. Yes, sir.

Q. Who fixes the rental rate for the property?

Mr. Cutler: I object as immaterial.

The Court: He may answer.

A. The rental rates were fixed and established by the Board of Directors.

Q. And they are available to the general public?

(Testimony of Fred Stofft.)

Mr. Cutler: I object as immaterial, irrelevant and incompetent, having no bearing on this issue.

The Court: I don't see the materiality. As far as the expert witnesses for the plaintiff are concerned, I believe they testified they made no effort to get them, if I am correct in that.

Mr. Thompson: I believe that is correct, your Honor. Your Honor ruled it is not admissible then?

The Court: The objection is sustained.

Q. (By Mr. Thompson): Did you, Mr. Stofft, sometime after December of 1951 or after the middle of December, 1951, ever have a conversation with Mr. Brauer, president of Worcester Felt Pad Corporation? A. Yes, sir. [225]

Q. Did you have more than one conversation to the best of your recollection?

A. Yes, to the best of my knowledge there were several.

Q. And where were those conversations had?

A. I believe they were in my store on East Pennington.

Q. Who else, if anybody, if you recall, was present?

A. There were other people in the store but none within earshot that I know of.

Q. Were the conversations you had with Mr. Brauer about the same matter or were there different subjects discussed?

A. There were several subjects discussed. The purpose of his coming in, I think, was one matter.

Q. It was in connection with a claim he was

(Testimony of Fred Stofft.)

making against the airport because of his removal from the airport, as he said? A. Yes, sir.

Q. And did you at any time during those discussions tell him what rent was being paid by Grand Central for the space previously occupied by him? A. No, sir.

Q. Did you yourself know? A. No, sir.

Q. Did you have any discussion with him in which you stated that Mr. Schmidt's salary had been raised because of his activities in connection with the Worcester Felt Pad matter? [226]

A. No, sir.

Q. No such conversation as that occurred with you? A. No, sir.

Q. Did he tell you, Mr. Brauer tell you he thought his company should be compensated for their expenses in moving? A. Yes, sir.

Q. Did you make any statements in response to that to him?

A. None other than if he had a justifiable claim I assured him if it was presented it would be acted on and given consideration.

Q. Other than that there was no——

A. No, sir.

Q. The Tucson Airport Authority, are the directors paid? A. No, sir.

Q. It is a purely non-profit corporation?

A. Yes, sir.

Q. Operated for the benefit of the municipality?

A. Yes, sir.

Mr. Thompson: That is all.

Mr. Cutler: No questions.

ERNEST A. SAYRE

called as a witness herein, having been first duly sworn, testified as follows: [227]

Direct Examination

Q. (By Mr. Thompson): Mr. Sayre, I will ask you first if you are here in response to a subpoena?

A. Yes.

Q. What is your full name, for the record?

A. Ernest A. Sayre, S-a-y-r-e.

Q. Are you connected with the Valley National Bank in any capacity?

A. I am, assistant cashier.

Q. I will ask you in response to the subpoena served on you in this case if you produced certain bank records? A. I did.

Q. Do you have them with you?

A. Yes, sir.

Q. Will you produce them, please, Without talking about their contents will you just tell me what records you have brought with you?

A. I brought the originating ledger sheets, the first ledger sheet that was used in opening the account, and the signature card.

Q. And the ledger sheets for subsequent months?

A. Yes, up to the time the account was closed.

Mr. Thompson: If your Honor please, may I have these marked for identification with the understanding that if any [228] of them are admitted

(Testimony of Ernest A. Sayre.)

I may substitute photostatic copies at some later date?

The Court: Very well.

Mr. Thompson: Will you mark this card I have here for identification?

(Defendant's Exhibit E marked for identification.)

Mr. Thompson: And may I have those marked?

(Defendant's Exhibit F marked for identification.)

Q. Showing you, Mr. Sayre, Defendant's Exhibit E for identification, without talking about the contents now just tell me what in bank parlance it is?

A. This is the originating signature card.

Q. Of a customer, is that correct?

A. Of a corporation. You see, the cards are designated by the nature of the accounts that are opened. This particular one is a corporation signature card, the originating card.

Q. What date does it bear?

A. It shows that the initial deposit was made on March 14, 1949, for \$1,000.

The Court: Are you offering it?

Mr. Thompson: I am going to offer it now, if your Honor please.

The Court: Any objection?

Mr. Cutler: No objection.

The Court: It may be admitted. [229]

(Defendant's Exhibit E in evidence.)

Q. Calling your attention now to Defendant's

(Testimony of Ernest A. Sayre.)

Exhibit F for identification, will you tell me what they purport to me, what they are?

A. This is a bank record of this particular account. It shows the initial deposit and the activity that was carried on through, oh, I would say, there are twelve ledger sheets, from the day of the opening until the day it was closed on February 19, 1952.

Mr. Thompson: We offer these in evidence.

The Court: Any objection?

Mr. Cutler: No objection.

The Court: They may be admitted.

(Defendant's Exhibit F in evidence.)

Q. I notice that there are certain erasures on Exhibit E. What do those show or deletions, I should say, rather than erasures?

A. This card, being a corporation card proposes to show that the secretary and president of the corporation authorized three different individuals to sign against the account.

Q. And those individuals were whom?

A. The first one being Robert J. Alpert, Archer A. Brown, vice president, and finally Anne Zerikan, secretary, which was later crossed out. Undoubtedly the authority was cancelled by the corporation to sign. [230]

Q. Calling your attention then to this document which is F in evidence, first off, on the extreme left hand side up to the line under the statement "checks"——

A. That is right.

Q. ——what does that purport to show?

(Testimony of Ernest A. Sayre.)

A. There are three columns. These are all checks or debits against the account.

Q. This shows checks drawn against the account, is that right? A. Yes.

Q. On the date of the checks shown?

A. Yes, the date is shown for each operation, of course.

Q. Is that on the extreme left hand side?

A. Extreme left hand side.

Q. And the deposits?

A. And the deposits would appear on the fourth column.

Q. And the date of the deposits?

A. Yes, sir.

Mr. Thompson: I have no further questions.

Cross Examination

Q. (By Mr. Cutler): Doesn't the bank usually have a corporate resolution from a corporation to authorize signatures?

A. It does. That is it. [231]

Q. Pardon?

A. That is it, that card.

Q. It says "Account opened by Black." Does that mean Mr. Black connected with your bank opened the account?

A. That is right, a bank employee, yes, sir.

Q. It says 3/14/49, that means March 14, 1949?

A. Yes.

Q. And the \$1,000 is the initial——

A. Initial opening deposit.

(Testimony of Ernest A. Sayre.)

Q. —initial opening account. And they gave you a reference. The only authorization that I can find on the back of this card, unless I am very much mistaken is Mr. Brauer could sign, or did I read that wrong?

A. Oh, yes, Julius E. Brauer. On the face of the card are the three signatures that are authorized; then on the back of the card bearing the corporation's seal, signed by the secretary. Julius E. Brauer, who is one of the two signatures on the lower authorization, his signature also appears up here.

Q. The lower authorization when the account was opened was only to Julius E. Brauer?

A. No. That was authorization given to the individual on the face of the card.

Q. Just a moment. Let's do one thing at a time, please, if you don't mind.

A. No, not at all. [232]

Q. An authorization of a corporation in order for your bank to properly honor a check, you must first have a corporate authorization or resolution authorizing such person to sign on behalf of the corporation?

A. That is right.

Q. Now, isn't it a fact that on this corporation's resolution which is on the back of this card it says: "Resolved that (blank) president," printed, not filled in, "and/or (blank) vice president," not filled in, printed, "and/or (blank) secretary," not filled in, printed, "or Julius E. Brauer, treasurer of this corporation be and they hereby are authorized to

(Testimony of Ernest A. Sayre.)

execute checks and other items for and on behalf of the corporation.” A. That is right.

Q. Now, as a banker do you agree with me that on behalf of this plaintiff corporation on the 14th day of March, 1949, when the account was opened and when the \$1,000 was put in as the initial deposit the only corporate resolution you had to authorize payment of checks was checks drawn by Brauer, signed by Brauer? A. No.

Q. Who else was authorized by this resolution to sign checks?

A. The very signatures that appear on the face of the card, otherwise we wouldn't have had those signatures affixed thereto.

Q. I don't know anything about your reasons for having [233] the signatures affixed thereto. Isn't it a fact you as a bank are required before you honor corporation withdrawals by check or otherwise, by any officer of the corporation, must have on file a resolution certified by the corporation that the named officer has the right to withdraw checks, is that true? A. Right.

Q. And the only named officer on the resolution was Brauer, is that right?

A. You are using the word “officer.” Authorized individuals.

Q. I will take that. And the only authorized individual on the resolution was Brauer, isn't that right? A. That is not right.

Q. Show me any authorization of the corporation, the Worcester Felt Pad Company, on this

(Testimony of Ernest A. Sayre.)

card that authorized anybody else to sign on behalf of the corporation?

A. On the face of the card——

Q. I didn't ask you what is on the face of the card.

A. I am telling you. "Below signed signatures of officers named in resolution are set forth on reverse hereof." This is what the bank goes by, of course. A bank will not accept a deposit nor an account without a resolution from a corporation. It is quite possible that in opening the account the clerk should have also procured the signatures on the reverse side instead of only on the front, which is all he really wanted.

Q. But the fact is you have no corporate resolution—— [234]

A. Yes, we have. There is your seal.

Q. Please, I didn't finish my sentence. The fact is that the front of the card says: "Below find signatures——" I had better start at the beginning, I might be accused of being unfair—"commercial" is in printing, meaning commercial account. I am on the first line now of the front. "Worcester Felt Pad Company" is typewritten out in full on the first line also? A. Yes, sir.

Q. That is the name of the customer or client?

A. That is right, for filing purposes.

Q. Now in printing it says on the back: "Below find resolutions of officers named in resolution set forth on reverse hereof," and it names Alpert, crosses out "president" and leaves no office; it

(Testimony of Ernest A. Sayre.)

names Archie A. Brauer, vice president; it names Anne Zerikan, some name like that, secretary, and her name is stricken out; then there is some pencil over which are the words "Account closed, February 19, 1952," then it says, "Address, 4147 East Whittier Street," written out, then it gives the name of the reference and the first deposit the representative of yours that took the account and the date March 14? A. Yes, sir.

Q. Now, I come back to the second line: "Below find signatures of officers named in resolution set forth on reverse [235] hereof." Is that right? That is printed. If I misread it I want you to tell me so.

A. Yes, that is right.

Q. Now, "Below find signatures of officers named in resolution set forth on reverse hereof." Are any of the three names set forth in the resolution on the reverse thereof? Can you answer that?

A. What is your question?

(The last question read.)

A. No, they are not. That card was sent to the corporation. If they didn't make them—we got them on the front that is where we wanted them.

Q. But the only resolution you got back from the corporation which you brought us from your files is that Julius Brauer, who has testified in this case, can sign on behalf of the company?

A. Yes, and they also procured for us the signatures on the front of that card.

Q. But no authorization?

A. I wouldn't say that.

(Testimony of Ernest A. Sayre.)

Q. Did you get any other authorization than this one, and I will finish the subject?

A. I can't say for sure.

Q. All right. Will you look in your records and find out? A. Yes. [236]

Q. Will you be good enough to let me know?

A. Yes.

Q. Thank you. I have only one other question. I am sorry to be so long winded but I wanted to get something off my chest.

Of course you don't assume to have any knowledge of what the checks were or the withdrawals or deposits were— A. Activity.

Q. I don't know what you would call it in bank parlance, activities? A. Yes.

Q. All you know is amounts, is that right?

A. That is right.

Q. For instance, if we take the first line on March 14, 1949, \$1,000 was the balance brought forth, that was the initial deposit?

A. That is right.

Q. On the second line on March 17 there are three items, \$100, \$52.30 and \$758.52 set out on the same line? A. Yes.

Q. All banks keep setting them out if there is room for it, if it is the same day?

A. That is right.

Q. You don't know what the \$100 was for?

A. No, sir. [237]

Q. You don't know whether it was for rent to Grand Central or anything else, do you?

(Testimony of Ernest A. Sayre.)

A. No.

Q. You don't know what the \$52.30 was for?

A. No.

Q. Or the \$758.52? A. No.

Q. You don't know what the deposits were for?

A. I could find out what the deposits were and detail them to you.

Q. I mean you don't know that? A. No.

Q. You are not saying that because you don't know? A. No.

Mr. Cutler: That is all.

Mr. Thompson: That is all.

ROBERT J. ALPERT

recalled as a witness, having been previously sworn, testified as follows:

Examination by Mr. Thompson:

Q. Mr. Alpert, you have been previously examined. When you first came to Tucson where did you reside? A. At 4147 East Whittier. [238]

Q. East Whittier? A. That is correct.

Q. I will ask you to state whether or not this is your signature that appears upon that card?

A. Yes, that is my signature.

Q. I say "that card" I should have said Defendant's Exhibit E in evidence, is that correct, that is your signature?

A. It looks like my signature, yes.

Q. You think it is, don't you?

(Testimony of Robert J. Alpert.)

A. Yes, it looks like my handwriting.

Q. You did write checks on the Worcester account at the Valley Bank during the time you were manager with the company here, didn't you?

A. That is correct.

Q. You had been here, I presume, some days before the bank account was opened in Tucson at least, had you not, Mr. Alpert, before the bank account was opened at the Valley National Bank?

A. I don't believe so.

Q. You think the first day you were here you went to the bank?

A. I have absolutely no recollection, sir.

Mr. Thompson: I believe that is all.

Examination by Mr. Cutler:

Q. Did you open the account yourself? [239]

A. No, I had nothing to do with opening the account.

Mr. Cutler: That is all.

Re-examination by Mr. Thompson:

Q. Mr. Alpert, you signed the signature card, didn't you, at the time it was opened?

A. I don't know when I signed the card.

Mr. Cutler: That is what I thought. That is all, Mr. Alpert.

(Witness excused.)

Mr. Evans: May we look at the exhibits here?

The Court: Very well.

Mr. Evans: At this time the defendant offers in

evidence the exhibits that are marked Plaintiff's Exhibit 6 and Plaintiff's Exhibit 7 for identification.

Mr. Clampitt: May I ask which dates those are? I believe under our pre-trial stipulation——

The Court: No objection?

Mr. Clampitt: I can't if I wanted to. I believe we stipulated they might go in.

(Plaintiff's Exhibits 6 and 7 in evidence.)

DEFENDANT'S EXHIBIT "G"

[Plaintiff's Exhibit 7 marked for identification November 30, 1953.]

[Letterhead of Department of Commerce, Civil
Aeronautics Administration]

Mr. R. F. W. Schmidt, Manager Oct. 9, 1951
Tucson Municipal Airport
Post Office Box 1191, Tucson, Arizona

Dear Mr. Schmidt:

Your letter of October 6, 1951, transmitting a copy of a letter dated September 26, 1951, from the Officer-in-Charge, Air Force Plant Office, Grand Central Aircraft Company, Gendale Region, Western Air Procurement District, is acknowledged.

The letter from the Air Force representative requests the Tucson Airport Authority to immediately make available all covered space previously occupied by Consolidated-Vultee and the Army Air Force for lease or rental to the Grand Central Aircraft Company, prime contractor of the United States.

The Tucson Municipal Airport was transferred to the City of Tucson, Arizona, by the United States Government under Agreement dated October 13, 1948. Under the terms of this Agreement the United States reserved the right during any national emergency to make exclusive or non-exclusive use of the airport or any portion thereof subject to certain enumerated conditions. The Government may exercise its right to such use by giving appropriate notice to the owning agency. In the absence of any waivers by the United States Government any leases or contracts entered into by the City of Tucson or the Tucson Airport Authority subsequent to October 13, 1948, would be subject to the rights reserved by the United States Government in said Agreement.

You have advised that the letter from the Air Force is not interpreted to be so restrictive as to require complete withdrawal of all civil functions from the structures located on the Tucson Municipal Airport. It is our opinion that the request of the Air Force dated September 26, 1951, is within the authority reserved to the Government in the aforementioned Agreement and constitutes an exercise of such authority for use of space at the airport. Accordingly, this office will interpose no objection to the granting of additional space to Grand Central Aircraft Company provided the release of such space will not affect necessary civil activities now operating from the airport. In the event the Air Force interprets its letter of September 26, 1951, to require the vacation of all covered space on

the Tucson Municipal Airport, this office desires to re-examine the issue in order to assure that essential civil activities can continue to operate at the Tucson Municipal Airport or at some suitable alternate location.

Very truly yours,

/s/ H. BROWN,

for H. A. Hook,

Chief, Airports Division

cc: Phil J. Martin, Jr., City Manager, Tucson, Ariz.

cc: Sent to Col. Pattillo and Wm. B. Birren

10/20/51—jr.

DEFENDANT'S EXHIBIT "H"

[Plaintiff's Exhibit 6 marked for identification November 30, 1953.]

(Copy)

[Tucson Airport Authority Letterhead]

Mr. H. A. Hook

October 6, 1951

Chief, Airports Division

Civil Aeronautics Administration

5651 West Manchester Avenue

Los Angeles 45, California

Dear Art:

With respect to your telegram of October 5 referring to my conversation with Mr. Winger, I believe that the attached copy of a communication from Colonel James L Pattillo of the Air Force

fairly well covers the situation. We have replied to this communication, pointing out that vacation of ALL covered space formerly occupied by Consolidated-Vultee or the Army Air Force would mean the complete withdrawal of all civil functions from the structures. We do not interpret his letter quite so strictly and neither do the representatives of Grand Central Aircraft Company.

We would like to proceed with an orderly withdrawal of some of our non-aeronautical tenants from space which the Air Force would like to have Grand Central occupy. Accordingly, I asked Mr. Winger for a copy of any directive under the President's Declaration of National Emergency which could be applied with the language of Colonel Pattillo's letter to legally terminate a lease containing the usual escape clauses. Any recommendations you may be in position to make will be deeply appreciated.

I have advised A. B. Curry, Chairman of the Airports Use Panel, of the situation but, for the present, I do not want to invoke the action of that body. I think we can solve these problems amicably if we can show that we are within our legal rights in asking certain non-aeronautical, non-defense tenants to cease their occupancy without compensation.

Yours very truly,

R. W. F. Schmidt,
Manager

RWFS:jr—Enc.

Mr. Evans: Defendant rests, if the Court please.

The Court: Any rebuttal?

Mr. Clampitt: Yes, I believe so, if the Court please.

No rebuttal. Plaintiff rests. [240]

The Court: Very well.

Mr. Evans: The defendant would like to make a motion, if the Court please.

The Court: Very well, Ladies and Gentlemen, counsel have urged some law matters on the Court so at this time I will have to ask you to retire again. I can't say for sure how long it might be but so that you have some freedom of movement I will tell you we will recess at this time until 4:30, but please don't come back into the courtroom until the bailiff tells you that you may. During the recess please bear in mind the admonition heretofore given you.

(Jury retires from courtroom.)

Mr. Evans: The defendant moves at this time, if it please the Court, for an order instructing the jury to return a verdict in favor of the defendant, upon the grounds that the plaintiff, now that all the evidence is in, has failed to prove the essential allegations of its complaint by any competent evidence, in that there is no competent evidence of fraud on the part of the defendant, that there is no competent evidence from which a constructive eviction of the plaintiff by the defendant from the premises described in the plaintiff's complaint is in the record, and upon the additional grounds that the evidence conclusively shows at this stage of the proceedings that the plaintiff company is a corpora-

tion incorporated in Massachusetts, that it has never qualified to do business within the State of Arizona in accordance with the laws of the State of Arizona, and that all the time from the time it executed the lease upon which this action is based until the time it withdrew from the premises of the Tucson Municipal Airport was engaged in doing business within the State of Arizona. And that as a result of its failure to comply with the statutory provisions for foreign corporations in this state, that its acts done in this state, including the execution of the lease which is the basis of this action, were and are completely void.

Mr. Clampitt: May it please the Court, let's take these matters up——

The Court: I am going to ask you, Mr. Clampitt, to direct your answer to counsel's motion or discussion to the point he made last, in other words, the proposition that the evidence discloses that the plaintiff is a Massachusetts corporation, never been licensed or qualified to do business in the State of Arizona, and that it has done business, entered into this lease and thereafter carried on a course of conduct in business, which counsel contends under the statute makes all their acts in the state void.

(Argument presented by counsel.)

The Court: In this matter I have the proposition, based upon the Arizona statutes and the Arizona authorities as I know them, and I have read them all, read them very carefully; I have also examined the other authorities in states having statutes like Arizona, and I come to the conclusion

that the Arizona courts with the evidence before this Court here would hold that this corporation was doing business in Arizona without having qualified under its laws and that all of its acts are void. I pointed out to counsel this morning in chambers the authority on which I base that. That was my view then and there has been nothing developed in the argument that has changed my view of it. And this being a diversity case, in other words, it is in this court merely because of diversity of citizenship, and the Supreme Court has said on this very point, that is the validity of acts done by a corporation which hasn't qualified, the Supreme Court has said the Federal Court is to apply the law of the State and if the doors of the State Court would be closed to a litigant in the facts of the case, then the doors of the Federal Court are also closed to him. On that basis the motion for directed verdict will be granted.

Call the jury in about two minutes.

(Jury returns to courtroom.)

The Court: Ladies and Gentlemen, it is the rule whenever in the trial of a case when the evidence is all in, the evidence in such case, and in the judgment of the Court there can be but one verdict rendered in the case, that, as a matter of law, it is the Court's duty to direct the verdict which the Court feels the evidence requires. That situation has arisen in [243] this case, so I have prepared a form of verdict in favor of the defendant in this case and against the plaintiff and I will ask you, sir, if you will, to sign that verdict as foreman.

Mr. Clampitt: If the Court please, may we at this time to protect our record, should we make any exception?

The Court: No, there is automatic exception.

Mr. Clampitt: That includes the motion for directed verdict?

The Court: Yes. I will ask the clerk to read and record the verdict.

(Verdict read and recorded.)

The Court: That will conclude your services in the case, Ladies and Gentlemen. At this time you will be excused subject to further call. I want to thank you before you leave for the patience and earnestness with which you have considered the case. You may retire.

Mr. Evans: May the Court entertain a motion at this time that judgment be entered in accordance with the verdict?

The Court: We will permit the jury to retire.

(Jury retires from courtroom.)

Mr. Evans: At this time, may it please the Court, the defendant moves that judgment be entered in accordance with the verdict of the jury.

The Court: On motion of the defendant there will be an [244] order for judgment in accordance with the verdict of the jury; that the plaintiff take nothing by its complaint.

Mr. Clampitt: May I ask the Court, in view of the way this matter has arisen, it occurs to me this is not a proper case for the costs to be assessed against the plaintiff here. This matter was brought up during the trial and it occurs to me it is quite

unfair to ask the plaintiff to be assessed. I believe under the present rule this Court has power to assess costs as it deems proper.

The Court: That matter will arise whenever counsel claim costs by serving a statement in writing on you; at that time if you desire to object to the taxing of costs you may follow the rule that provides how that may be done. Stand at recess.

[Endorsed]: Filed July 27, 1954.

[Endorsed]: No. 14462. United States Court of Appeals for the Ninth Circuit. Worcester Felt Pad Corporation, a corporation, Appellant, vs. Tucson Airport Authority, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: July 31, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14462

WORCESTER FELT PAD CORPORATION, a
Massachusetts Corporation, Appellant,

vs.

TUCSON AIRPORT AUTHORITY, an Arizona
Corporation, Appellee.

STATEMENT OF POINTS

Pursuant to Rule 19 (6) of the Rules of Practice of the above-entitled court, the appellant hereby states the points on which he intends to rely, as follows:

1. The District Court erred in directing a verdict against the plaintiff and in favor of the defendant.
2. The District Court erred in refusing to submit the case to the jury.
3. The District Court erred in holding that as a matter of law plaintiff was not entitled to recover.
4. The District Court erred in entering final judgment in favor of defendant.
5. The District Court erred in directing a verdict for defendant upon motion of the defendant.
6. The evidence introduced at the trial was of such character concerning the making of the lease that the plaintiff was clearly entitled to go to the jury on the question of the validity of the lease

itself, and for that reason the action of the trial court in instructing the jury to return a verdict in favor of the defendant invaded the province of the jury.

Dated August 21, 1954.

C. WAYNE CLAMPITT,

A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,

Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 24, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Pursuant to Rule 19 (6) of the Rules of Practice of the above-entitled court, the appellant hereby designates the following parts of the record as material to the consideration of the appeal:

1. Court Docket Entries.
2. Entire record transferred from the United States District Court for the District of Arizona by District Clerk of Court and filed in the above entitled cause, including all docket entries, all pleadings, all Minute Entries, including court's Direction of Verdict, Verdict, all Exhibits, Plaintiff's Motion

for New Trial and Minute Entry denying Notice of Appeal and Stipulation designating Record, Reporter's Transcript, Stipulation and Order Extending Time to File Record, Statement of Points and this Designation.

Dated August 21, 1954.

C. WAYNE CLAMPITT,
A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 24, 1954. Paul P. O'Brien,
Clerk.